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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1583

FRANCES MORRIS, *et al.*,
Appellants,

v.

L. MARION GRESSETTE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of South Carolina

JURISDICTIONAL STATEMENT

Of Counsel:

MAX O. TRUITT, JR.
TIMOTHY N. BLACK
WILLIAM T. LAKE
ELWYN C. LEE
WILMER, CUTLER & PICKERING

J. ROGER WOLLENBERG
1666 K Street, N.W.
Washington, D.C. 20006

FRANK EPSTEIN
RAY P. McCLAIN
EPSTEIN, McCLAIN & DERFNER

ARMAND DERFNER
123 Meeting Street
Charleston, S.C. 29402

WILLIAM E. CALDWELL
LAWYERS COMMITTEE FOR
CIVIL RIGHTS UNDER LAW

PAUL DIMOND
733 15th Street, N.W.
Washington, D.C. 20005

Attorneys for Appellants

April 28, 1976

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JURISDICTIONAL STATEMENT

This is an appeal from the decision of a three-judge United States District Court sitting in the District of South Carolina, which denied an injunction against the enforcement of a South Carolina legislative redistricting statute and dismissed appellants' complaint.

OPINION BELOW

The opinion of the United States District Court for the District of South Carolina, Charleston Division (Haynsworth and Russell, C.J.J., and Hemphill, D.J.), is not yet reported. A copy of the opinion is

appended hereto as Appendix A. The unreported opinion in the related case of *Twiggs* v. *West*, Civ. No. 71-1106 (D.S.C. Apr. 7, 1972), is appended hereto as Appendix B.

JURISDICTION

This suit was brought under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, for declaratory and injunctive relief against the enforcement of an act of the South Carolina legislature reapportioning the state Senate. Jurisdiction in the district court was founded on 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. 1973c. The district court entered its judgment on March 12, 1976, and denied appellants' Motion to Alter or Amend Judgment on March 30, 1976 (Appendix C). Appellants filed their notice of appeal in the district court on April 16, 1976 (Appendix D).

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1253 and 2101(b). *See Georgia* v. *United States*, 411 U.S. 526 (1973); *Perkins* v. *Matthews*, 400 U.S. 379 (1971); *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969).

STATUTES INVOLVED

Section 2 of Act 1205 of 1972, S.C. Code § 30-4.4 ("Act 1205"), is set forth in Appendix E hereto. Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, is set forth in Appendix F.

QUESTIONS PRESENTED

South Carolina has adopted a reapportionment plan for its state Senate that includes many multi-

member districts, with a requirement that candidates in each district run for numbered posts. If no candidate wins a majority of the vote in a Senate primary, there must be a runoff election. The Attorney General of the United States, acting pursuant to an order of the United States District Court for the District of Columbia, reviewed the South Carolina reapportionment law under Section 5 of the Voting Rights Act, and objected to it on the ground that it has a "clear and substantial" discriminatory effect. The appellants thereafter sued in the United States District Court for the District of South Carolina, in accordance with *Georgia* v. *United States*, 411 U.S. 526 (1973), seeking an injunction against the enforcement of the state law on the ground that South Carolina had not obtained preclearance either from the Attorney General or from the District Court for the District of Columbia. The South Carolina federal court refused the requested injunction, stating that it disagreed with the ruling of the District of Columbia federal courts pursuant to which the Attorney General reviewed the state law and made his objection. The questions presented in these circumstances are:

1. Whether the court below erred in declining to enjoin the enforcement of the South Carolina Senate reapportionment law where the Attorney General had objected to the law and the state had not obtained preclearance from the District Court for the District of Columbia.

2. Assuming *arguendo* that the court below was free to treat the Attorney General's objection as a nullity if it disagreed with the court ruling pursuant to which the objection was made, whether the court

below erred in disagreeing with the ruling of the District of Columbia Circuit that the Attorney General's initial failure to act was reviewable.

3. Assuming *arguendo* that the South Carolina Senate reapportionment is properly regarded as a "court-ordered plan" exempt from Section 5 preclearance procedures, whether the reapportionment is invalid because it includes multi-member districts disapproved by this Court for court-ordered plans.

STATEMENT

South Carolina's 1972 Senate reapportionment law contains discriminatory features that the Attorney General has found have a "clear and substantial racial effect." This case involves an attempt by black South Carolina voters to prevent the implementation of that discriminatory law on the ground that the state has not obtained preclearance of the plan as required by Section 5 of the Voting Rights Act ("Section 5").

For much of this century, South Carolina restricted black political participation by such devices as literacy tests and white primaries. When the Voting Rights Act was passed in 1965, only 37.3% of South Carolina's eligible non-whites were registered to vote.[1] At that time, the South Carolina Senate consisted entirely of single-member districts. In the seven years between the passage of the Voting Rights Act and 1972 the date of the last Senate election, non-white registration increased dramatically,

[1] U.S. Comm'n on Civil Rights, Political Participation 252-53 (1968).

to the point where 60.1% of South Carolina's eligible non-whites were registered.[2] The state House of Representatives, which was reapportioned in 1974 to include only single-member districts after the Attorney General objected to a multi-member plan, now contains 13 blacks out of 124 members. However, the South Carolina Senate was changed to multi-member districts, and a discriminatory multi-member plan will be perpetuated if the decision below is sustained. The South Carolina Senate today contains no black members, although over 25% of the state's registered voters in 1972 were black.[3]

When required by court order to review the South Carolina Senate reapportionment law under Section 5, the Attorney General found the law discriminatory and objected to it. The state chose not to adopt a new plan in response to the objection or to seek preclearance from the District Court for the District of Columbia, but announced that it would implement its law despite the requirements of Section 5. The court below has held that it may continue in that course. The facts underlying this abridgement of black voting rights are largely undisputed.

[2] Eligibility figures derived from data in U.S. Bureau of Census, 1970 Census—General Population Characteristics, PC(1)—B42 SC, Table 20: "Age by Race and Sex." Registration figures taken from South Carolina Election Commission, Report For the Period Ending June 30, 1973, at 574 (1974).

[3] South Carolina Election Commission, Report for the Period Ending June 30, 1973, at 574 (1974).

A. Act 932

In 1971 South Carolina enacted Act 932, which reapportioned the state Senate. That law created many multi-member districts having significant minority concentrations of black voters. It required candidates in those districts to run for numbered posts, and a runoff requirement prevented any candidate from winning a Senate primary election by less than a majority vote.

South Carolina submitted Act 932 to the Attorney General pursuant to Section 5, and he interposed an objection to the statute on March 6, 1972, on the ground that South Carolina had not met its burden of proving nondiscrimination. His letter of objection said that he was "unable to conclude, with respect to those plans, that the combination of multi-member districts, numbered posts, and a majority runoff requirement would not occasion an abridgment of minority voting rights in South Carolina."

Meanwhile, two suits had been filed in 1971 before a three-judge United States District Court for the District of South Carolina, attacking Act 932 under the one-man, one-vote rule; a third suit by black plaintiffs attacked the law under the Fifteenth Amendment and sought to enjoin its enforcement until it was precleared pursuant to Section 5. The Attorney General advised the district court of his Section 5 objection to Act 932 and asked the court to enjoin the enforcement of Act 932 on that ground without reaching the constitutional issues. The district court, however, proceeded to decide the constitutional issues on April 7, 1972. It held that the Act violated the Fourteenth Amendment by creating large population disparities among districts, but held that

the black plaintiffs had not carried the burden of proof on their Fifteenth Amendment claim. The court expressly declined to rule on the claims under Section 5, recognizing that it was without jurisdiction to do so:

> "[T]he District Court for the District of Columbia . . . is the proper forum for review under the terms of the Voting Rights Act of 1965. We shall accordingly not consider the claims of the plaintiff . . . under the Voting Rights Act, but shall confine our consideration to the claims of invalidity under the Fourteenth and Fifteenth Amendments . . . ." *Twiggs* v. *West*, Civ. No. 71-1106 (D.S.C. Apr. 7, 1972), Appendix B at 30a.

The court gave the South Carolina legislature thirty days to enact another apportionment plan, failing which the court would draw up a plan itself. Appendix B at 45a, 48a.

B. Act 1205

On May 5, 1972, the legislature enacted Act 1205 (the statute involved here), of which Section 2 reapportioned the state Senate. The new plan ameliorated the population disparities, but aggravated the multi-member-district flaw cited in the Attorney General's objection by creating larger multi-member districts. The state submitted the new act to the Attorney General under Section 5 and simultaneously transmitted a copy to the South Carolina district court, which *sua sponte* entered an order finding the Senate reapportionment in Act 1205 to be constitutional.[4]

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[4] *Twiggs* v. *West*, Order of May 23, 1972 (D.S.C., Civ. No. 71-1106), *aff'd mem. sub nom. Powell* v. *West*, 413 U.S. 901

By letter of June 30, 1972, the Attorney General declined to object to Section 2 of Act 1205, although it contains the same features to which he had objected in Act 932.[5] He explained that he would not exercise his own judgment under Section 5 but felt "constrained to defer to the . . . determination of the three-judge District Court" in *Twiggs* v. *West*, *supra*.

Black South Carolina voters then brought suit on August 10, 1972, in the United States District Court for the District of Columbia. They sought a ruling that the Attorney General was required to make an independent determination of the validity of the Senate reapportionment under Section 5 without "deferring" to the South Carolina district court.[6] The District Court for the District of Columbia held that the Attorney General's refusal to exercise his Section 5 responsibilities was reviewable for legal error under the Administrative Procedure Act, 5 U.S.C. § 702, and that the Attorney General had wrongly "abdicated" those responsibilities by purporting to defer to a court decision that had expressly declined to pass on the Section 5 question. The district court ordered

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(1973). (The appeal was on behalf of a political party and raised no racial discrimination or Section 5 questions.)

[5] The Attorney General did object to Section 3 of Act 1205, which provided for numbered seating in all multi-member districts of the state House of Representatives.

[6] On August 11, 1972, the District Court for the District of Columbia entered an interm order finding as a fact that the Attorney General's time for objecting to Act 1205 had not yet expired and extending his time to object pursuant to 5 U.S.C. § 705, in order to preserve the court's jurisdiction to rule on the complaint.

the Attorney General to make his own independent determination of the validity of Act 1205. *Harper* v. *Kleindienst*, 362 F. Supp. 742 (D.D.C. 1973), *aff'd sub nom. Harper* v. *Levi*, 520 F.2d 53 (D.C. Cir. 1975).

The Attorney General then reviewed Act 1205 under the standards of Section 5. He concluded that

> "Act 1205 has a clear and substantial racial effect in contravention of the Fifteenth Amendment and its protections under Section 5 of the Voting Rights Act."

The Attorney General specifically found that the identical features that had caused him to object to Act 932 "are also present upon reviewing the existing Act in question (Act No. 1205)," and advised South Carolina of his objection to Act 1205 on July 20, 1973.

Although the Attorney General's independent judgment was that Act 1205 was discriminatory, he nonetheless appealed to the United States Court of Appeals for the District of Columbia Circuit, challenging the district court's ruling that had required him to make his independent review of Act 1205. The court of appeals affirmed the district court's ruling, *Harper* v. *Levi*, 520 F.2d 53 (D.C. Cir. 1975), and the Attorney General did not seek certiorari.

C. South Carolina's Actions

South Carolina submitted Act 1205, like its predecessor, to the Attorney General for preclearance under Section 5. By direction of the district court in *Harper*, the Attorney General formally notified South Carolina of the court's August 11, 1972 order that

tolled the Attorney General's time to object to Act 1205. *See* note 6 *supra*. At no time did South Carolina seek to become a party to the *Harper* litigation or seek relief from the tolling order. And at no time after the state was notified on July 20, 1973 of the Attorney General's objection to Act 1205, did the state seek preclearance by the alternate statutory route of a declaratory judgment action in the District Court for the District of Columbia. Indeed, the state Senate caucused and decided on November 5, 1975 simply to ignore the Attorney General's objection.

D. The Proceedings Below

On November 7, 1975, appellants filed this suit, seeking declaratory and injunctive relief against the enforcement of Act 1205 in the upcoming 1976 Senate elections. The United States appeared as *amicus curiae* and took the position that the district court should give effect to the Attorney General's objection to Act 1205. It conceded the error in the Attorney General's initial refusal to evaluate Act 1205, acknowledging the correctness of the *Harper* ruling on that issue.[7] The United States also suggested that *Connor* v. *Waller*, 421 U.S. 656 (1975), and *Chapman* v. *Meier*, 420 U.S. 1 (1975), counseled imposition of a single-member plan should it become

[7] Amicus Memorandum of the United States, filed Jan. 28, 1976. The United States noted that, under *Connor* v. *Waller*, 421 U.S. 656 (1975), the Attorney General and the District Court for the District of Columbia have exclusive jurisdiction over laws covered by Section 5, and other district courts are precluded from ruling on constitutional challenges based on racial discrimination until preclearance has been obtained.

necessary for the district court to fashion an interim plan for the 1976 Senate elections.[8]

After a hearing, the three-judge district court denied the requested relief and dismissed the complaint on March 12, 1976. The court held that it need not follow the District of Columbia Circuit's decision in *Harper* v. *Levi*, because the state had not been a party to the prior suit. It further held that the District of Columbia courts had erred in holding that the Attorney General's initial refusal to make his own determination of the validity of Act 1205 was reviewable. Although it did not dispute the *Harper* district court's authority to toll the deadline for the Attorney General's action, the court below stated that the Attorney General's objection made in response to *Harper* had no effect and that South Carolina is free to enforce Act 1205.

On March 22, 1976, appellants moved to alter or amend the judgment, apprising the district court of the possible bearing of this Court's decision in *East Carroll Parish School Board* v. *Marshall*, 44 U.S.L.W. 4320 (U.S. Mar. 8, 1976), in order to insure a complete disposition of all issues pertaining to Act 1205 in this proceeding. Appellants simultaneously requested an injunction pending appeal. The district court on March 31, 1976 denied these motions without opinion.

This appeal followed.

THE QUESTIONS ARE SUBSTANTIAL

Act 1205 is plainly discriminatory. The Attorney General found its use of multi-member districts,

[8] *Id.*

numbered posts, and a majority runoff to have a "clear and substantial" discriminatory effect, and objected to it on that ground. Successive Attorneys General have consistently taken this position in objecting to an earlier South Carolina Senate plan, a South Carolina House of Representatives plan, and the reapportionments of both houses of the legislatures of Georgia, Mississippi, and Louisiana. This Court has upheld the Attorney General's view, stating that it is "beyond doubt" that such provisions "have the potential for diluting the value of the Negro vote." *Georgia* v. *United States*, 411 U.S. 526, 534 (1973).[9] Yet, after more than four years of litigation, South Carolina is continuing to give effect to its discriminatory Senate plan.

All parties have agreed from the outset that Act 1205 is subject to the preclearance requirement of Section 5. As the court below said:

> "It is conceded by all parties that the challenged legislation is within the coverage of the Voting Rights Act of 1965 and that compliance with § 5 of that Act was a condition to the enforcement of such legislation." Appendix A at 2a.

South Carolina submitted Act 1205, like its predecessor, to the Attorney General for Section 5 review. Like its predecessor, Act 1205 was objected to. Yet the ruling below, if sustained, would permit South Carolina to perpetuate its discriminatory Senate

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[9] *See also Perkins* v. *Matthews*, 400 U.S. 379 (1971); *Amos* v. *Sims*, 409 U.S. 942, *aff'g* 336 F. Supp. 924 (M.D. Ala. 1972); *Petersburg* v. *United States*, 410 U.S. 962 (1973), *aff'g* 354 F. Supp. 1021 (D.D.C. 1972).

scheme without Section 5 preclearance. That ruling is infirm for at least three reasons.

1. The decision below is inconsistent with Section 5, whether or not *Harper* was rightly decided. The *Harper* decision, requiring the Attorney General to make his own evaluation of Act 1205, was simply the circumstance that led him to object to the state law. The critical fact is that he did object, after reaching the conclusion that Act 1205 is discriminatory. Regardless of the circumstances that led him to evaluate the law, his objection prevents Act 1205 from being effective until the state obtains preclearance by the alternative means prescribed in Section 5. Section 5 "essentially freezes the election laws of the covered States unless a declaratory judgment is obtained in the District Court for the District of Columbia . . . ." *Georgia* v. *United States*, 411 U.S. 526, 538 (1973). Where an objection is entered, the only role of the local federal courts is to enjoin implementation of the voting change pending preclearance. *Id.*; *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969); *Perkins* v. *Matthews*, 400 U.S. 379 (1971); *Connor* v. *Waller*, 421 U.S. 656 (1975); *Holt* v. *Richmond*, 406 U.S. 903 (1972).

The court below thus had no authority to treat the Attorney General's objection as a nullity, but was required to honor it. South Carolina has deliberately eschewed filing suit in the District of Columbia to obtain preclearance of Act 1205. Under the terms of Section 5, Act 1205 has no effect until the state does so.

The court below suggested that the Attorney General's objection could be disregarded because it was made more than 60 days after Act 1205 was sub-

mitted to him. The court did not dispute that the district court in *Harper* had authority to enter the August 11, 1972 order extending the Attorney General's time to object;[10] but it seems to have thought that the extension was ineffective if the *Harper* courts were wrong in holding the Attorney General's action to be reviewable. In fact, the effectiveness of the extension did not depend on the correctness of the ultimate ruling in *Harper*. Regardless of any ultimate determination on the reviewability issue, the district court in *Harper* plainly had jurisdiction to determine that issue. Having such jurisdiction, it had the power to toll the Attorney General's time to object, in order to preserve its ability to grant relief if appropriate. "[T]he District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief." *United States* v. *United Mine Workers*, 330 U.S. 258, 293 (1947); *see id.* at 289-95. The

[10] A statutory deadline for action by an administrative agency does not limit the agency's power to act pursuant to a court order arising out of a judicial review proceeding. *Harper* v. *Levi*, 520 F.2d at 64-66; *Bachowski* v. *Brennan*, 502 F.2d 79 (3d Cir. 1974), *aff'd in part sub nom. Dunlop* v. *Bachowski*, 421 U.S. 560 (1975); *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615, 650 (D.C. Cir. 1973).

Moreover, although appellants believe the filing date of the review proceeding is not controlling, we note that the court in *Harper* found as a fact, contrary to the view of the court below (App. A at 3a), that the review proceeding was filed—and its jurisdiction therefore attached—during the Attorney General's 60-day allowed period from receipt of a completed submission, as measured in accordance with the tolling regulations. 28 C.F.R. §§ 51.3(b)-(d), 51.18; *see Georgia* v. *United States*, *supra*, 411 U.S. at 539-41.

Attorney General's objection, having been entered within the time period as extended, is effective to prevent the implementation of Act 1205 unless the state obtains preclearance from the District Court for the District of Columbia in the manner provided by Section 5.

Moreover, assuming *arguendo* that the effectiveness of the Attorney General's objection hinged on the correctness of the *Harper* decision, the court below erred in refusing to give effect to the final decree of another federal court. Since the issues were vigorously litigated in *Harper*, and appellees deliberately refused to take advantage of their opportunity to intervene, deference by the court below to the *Harper* decision was obviously the appropriate course.[11] At a minimum, *stare decisis* and concern for harmonious judicial administration should have led the court below to treat the ruling of the court of appeals of a sister circuit as "substantially binding." *Dawson* v. *Fernley & Eger*, 196 F. Supp. 816, 823 (E.D. Va. 1961).[12] It appears, however, that the

[11] *See Penn Central Merger Cases*, 389 U.S. 486, 505-06 (1968). "Those who are accorded an opportunity to be heard in a judicial proceeding established for determining the extent of their rights are properly bound by its outcome, either because they chose not to contest the State's claim or because they chose to do so and lost." *McKinney* v. *Alabama*, 44 U.S.L.W. 4330, 4332 (U.S. Mar. 23, 1976). *See also U.A.W.* v. *Scofield*, 382 U.S. 205, 212-13 (1965); *Nuesse* v. *Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967); *Red River Broadcasting Co.* v. *FCC*, 98 F.2d 282 (D.C. Cir.), *cert. denied*, 305 U.S. 625 (1938).

[12] "When one Circuit Court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action demands that it should be followed by District

court below gave no weight to *Harper* on either legal or factual questions.

2. Even if the court below properly reached the *Harper* issues, its disposition of those issues is at odds with established law. The court below held that the Attorney General's initial refusal to perform his responsibilities under Section 5, which was based on an error of law, was immune from correction by the courts. That holding cannot be squared with the principle that final agency actions are reviewable under the Administrative Procedure Act ("APA"), except where review is statutorily precluded or "agency action is committed to agency discretion by law." 5 U.S.C. § 702. This Court has said that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967); *see Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). No such evidence exists in the case of Section 5.

First, nothing in Section 5 or its legislative history even hints that Congress intended to preclude judicial review of legal errors. Indeed, the legislative history points the other way.[13] Second, this Court's

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Courts until modified by the Appellate Court of the Circuit in which the District Court is located, or by the Supreme Court of the United States." *Gustafson* v. *Fred Wolferman*, 73 F. Supp. 186, 192 (W.D. Mo. 1947). *Accord, e.g., Spicknall's Estate* v. *C.I.R.*, 285 F.2d 561, 567 (8th Cir. 1960); *Homan* v. *United States*, 279 F.2d 767, 773 (8th Cir.), *cert. denied*, 364 U.S. 885 (1960).

[13] Congress was aware of the ruling in *Harper* v. *Levi* when it extended the Voting Rights Act in 1975, but it indicated no disapproval of the decision. Indeed, the decision was referred to in the Senate committee report and was praised

decisions and the Attorney General's regulations implementing Section 5 make clear that the Attorney General's responsibilities under that Section are quasi-judicial. He is to determine the validity under Section 5 standards of voting changes submitted by covered states, acting as a surrogate for a three-judge District Court for the District of Columbia. *See* 28 C.F.R. §§ 51.18-21; *Georgia* v. *United States*, 411 U.S. 526, 537 (1973). Under these circumstances, to hold that the statute precludes review is to reverse the presumption of reviewability established in *Abbott Laboratories*.[14]

The court below expressed its concern that the *Harper* ruling would expose every determination by the Attorney General under Section 5 to review in the courts. But the court ignored the limited nature of the *Harper* ruling. *Harper* held only that Section 5 requires the Attorney General to make an independent review of state laws submitted to him, and that he was legally wrong in believing that *Twiggs* precluded such a review of Act 1205. The *Harper* decree was in the nature of a mandamus under 28

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on the House floor by the floor manager of the extending legislation. *See* S. Rep. No. 94-295, 94th Cong., 1st Sess. 18 (1975); 121 Cong. Rec. H7631 (daily ed. July 28, 1975).

[14] The court below also suggested that judicial review was inappropriate because the Attorney General's refusal to exercise his Section 5 responsibilities did not foreclose the right of black voters to sue under the Fifteenth Amendment. Appendix A at 15a. That suggestion disregards the fact that Congress enacted Section 5 because of its conclusion that existing Fifteenth Amendment remedies were inadequate. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966); *Georgia* v. *United States*, 411 U.S. at 536-38.

U.S.C. § 1361—an order that the Attorney General perform his mandatory duty to evaluate Act 1205—and did not purport to dictate or even influence the conclusions he might reach. To the contrary, the courts in *Harper* recognized that it was for *the Attorney General* to evaluate Act 1205, and did not suggest that his determination on the merits was subject to judicial review. *Harper* thus opens no Pandora's box of judicial review, as the Attorney General himself implicitly recognized in not seeking certiorari in *Harper*.

The decision below stands in direct conflict with the final decree in *Harper*. An objection entered by the Attorney General pursuant to an order affirmed by the District of Columbia Circuit has been declared to have no effect by an inferior federal court in another circuit. Such a conflict would call for plenary review by this Court even on certiorari. Since this is a direct appeal, full consideration is obviously appropriate.

3. In their Motion to Alter or Amend Judgment, appellants directed the attention of the court below to this Court's recent decision in *East Carroll Parish School Board* v. *Marshall*, 44 U.S.L.W. 4320 (U.S. Mar. 8, 1976), and to the possibility that Act 1205 might be considered a "court-ordered plan" under that decision. For the reasons set forth in the margin,[15] appellants believe that Act 1205 is not a court-

[15] In *East Carroll Parish*, the Court held that a police jury's reapportionment of itself was a court-ordered plan and exempt from Section 5, where the police jury had no authority under state law to reapportion itself but acted solely under the authority of a federal court order. The Court said, "Had

ordered plan within the meaning of *East Carroll Parish*, but is subject to Section 5 as construed in *Connor* v. *Waller*, 421 U.S. 656 (1975). Every court that has considered the issue—as well as the parties and the United States—has agreed that Act 1205 requires preclearance under Section 5. If, however, Act 1205 is held to be controlled by *East Carroll Parish*, then the applicable principles are those governing a district court's exercise of its supervisory power over a reapportionment. *Chapman* v. *Meier*, 420 U.S. 1 (1975).

East Carroll Parish and *Chapman* hold that, "absent the most pressing circumstances," a court may

the East Carroll police jury reapportioned itself on its own authority, clearance under § 5 of the Voting Rights Act would clearly have been required." 44 U.S.L.W. at 4321 n.6. In this case, the South Carolina legislature had full authority under the state constitution to apportion itself, and has done so repeatedly. It adopted Act 1205 as the successor to Act 932, which it submitted for preclearance and to which the Attorney General objected. Moreover, the court order of April 7, 1972 invalidating Act 932 under the Fourteenth Amendment was itself premature under *Connor* v. *Waller*, which establishes that the court should have—as the United States recommended—deferred to the exclusive jurisdiction of the Attorney General and the District Court for the District of Columbia by simply enjoining Act 932 for lack of Section 5 clearance. *See* S. Rep. No. 94-295, 94th Cong., 1st Sess. 18 (1975). Finally, the litigation testing Act 932, which resulted in the April 7 order, began with a suit filed by the South Carolina Attorney General at the direction of the state legislature. Concurrent Resolution S. 671, General Assembly of 1971, adopted by the South Carolina Senate on November 4, 1971 (Senate Journal of 1971, 2505), and by the South Carolina House of Representatives on November 9, 1971 (3 House Journals of 1971, 3717).

not order a multi-member reapportionment plan. In this case, there has been no finding of pressing circumstances; nor could there be, in view of the Attorney General's finding of "clear and substantial" discriminatory effect. Act 1205, with its multi-member districts, is fatally defective under any view of the case, and the court below was wrong in refusing to enjoin its implementation.[16]

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction.

Respectfully submitted,

Of Counsel:

MAX O. TRUITT, JR.
TIMOTHY N. BLACK
WILLIAM T. LAKE
ELWYN C. LEE
WILMER, CUTLER & PICKERING

J. ROGER WOLLENBERG
1666 K Street, N.W.
Washington, D.C. 20006

FRANK EPSTEIN
RAY P. McCLAIN
EPSTEIN, McCLAIN & DERFNER

ARMAND DERFNER
123 Meeting Street
Charleston, S.C. 29402

WILLIAM E. CALDWELL
LAWYERS COMMITTEE FOR
CIVIL RIGHTS UNDER LAW

PAUL DIMOND
733 15th Street, N.W.
Washington, D.C. 20005

Attorneys for Appellants

April 28, 1976

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[16] If Act 1205 were held to be a court-ordered plan, single-member districts would be required notwithstanding that the plan was originally implemented four years ago. *Whitcomb* v. *Chavis*, 403 U.S. 124, 162-63 (1971).

APPENDICES

APPENDIX A

Opinion Below

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION
THREE-JUDGE COURT

No. CA/75-1998

FRANCES MORRIS AND MAXINE WOODS,
Plaintiffs,

—versus—

L. MARION GRESSETTE, President Pro Tem of the South Carolina Senate; JAMES B. EDWARDS, Governor of South Carolina, DANIEL R. MCLEOD, Attorney General of South Carolina; BRANTLEY HARVEY, JR., Lieutenant Governor of South Carolina; LOVICK C. THOMAS, Clerk of the South Carolina Senate; O. FRANK THORNTON, Secretary of State of South Carolina; JAMES ELLISOR, Executive Director of the South Carolina State Election Commission; G. P. CALLISON, Chairman, South Carolina State Election Commission; MARGARET TOWNSEND, MARTHA CHAPMAN, EDGAR L. MORRIS, and RUBEN GRAY, Members, South Carolina State Election Commission,

Defendants.

Heard: January 28, 1976. Decided: March 12, 1976

Before HAYNSWORTH, Chief Circuit Judge, RUSSELL, Circuit Judge, and HEMPHILL, District Judge.

RUSSELL, Circuit Judge:

The plaintiffs seek by this action to enjoin the enforcement of the South Carolina State Senate Reapportionment Act of 1972 (described as Act 1205 in the complaint)[1] on the ground that such Act has never been validated as required by § 5 of the Voting Rights Act of 1965, § 1973c, 42 U.S.C.[2] The background of the legislation under review and the litigation surrounding it is fully set forth in *Harper* v. *Levi* (D.C.Cir. 1975) 520 F. 2d 53. It is unnecessary to repeat it in any detail since the issues involved here are fairly narrow and the factual basis for them largely uncontroverted.

It is conceded by all parties that the challenged legislation is within the coverage of the Voting Rights Act of 1965 and that compliance with § 5 of that Act was a condition to the enforcement of such legislation. Compliance, giving the State either interim or permanent clearance for enforcement of the legislation, however, could have been effected by

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[1] Senate Reapportionment Statute, Act 1205 of 1972.

[2] Plaintiffs rely for authority to maintain the action, it would seem, on *Allen* v. *State Board of Elections* (1969) 393 U.S. 544, 561:

> "* * * [A]n individual may bring a suit for declaratory judgment and injunctive relief, claiming that a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny."

the State under § 5 in two ways. It could have filed an action for a declaratory judgment in the District Court for the District of Columbia or it could, through the State Attorney General, have submitted the legislation to the Attorney General of the United States for such clearance. If, in the declaratory judgment action, the legislation had been found not to offend the Voting Rights Act, or, if the Attorney General of the United States, within sixty days after submission to him, failed to interpose an objection to the legislation, the State could enforce the revised election procedure, unless and until there has been a successful proceeding to invalidate the state law on constitutional grounds.

In this case, the State chose, in line with the practice generally adopted by complying States under the Act, to follow the procedure of submitting the reapportionment legislation to the Attorney General of the United States.[3] It is conceded the Attorney General did not interpose an objection to the legislation within sixty days after it was properly submitted to him. Actually, he advised the State formally within the sixty day period that he interposed no objection to the enforcement of the legislation. The plaintiffs herein, however, filed, about thirty days after the expiration of the sixty day period allowed the Attorney General to interpose objection, "a class action in the District Court [of the District of Columbia] seeking review, pursuant to Section 10 of the Administrative Procedure Act, or [the]

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[3] *See*, Note, *Discriminatory Purpose, Charges and Dilution: Recent Judicial Interpretations of § 5 of the Voting Rights Act*, 51 *Notre Dame Lawyer* 333 at 334, n. 11.

decision of the then Attorney General to forego objection under Section 5 of [the] proposed reapportionment of the South Carolina Senate."[4] The District Court held in that case that the action of the Attorney General was reviewable under the Administrative Procedure Act[5] and, on review, concluded "that the Attorney General had not fulfilled his statutory obligation and ordered him to reconsider without regard to the prior court decision."[6] On appeal, the jurisdiction to review was upheld and the finding that the prior failure to interpose an objection by the Attorney General was ineffectual to make the enforcement of the Act effective was sustained.[7]

At this point, the plaintiffs, armed with the decision in *Harper*, returned to this Court. They contended that, on principles of collateral estoppel, *Harper* is conclusive on the issues of (1) the reviewability under the Administrative Procedure Act of

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[4] It is of interest that the same judge who decided *Harper* later in another case where a private party sought judicial review of the Attorney General's determination under § 5 dismissed, *sua sponte* the petition for review, stating that "a request for review of the Attorney General's findings may be made *only* by the State or political subdivision covered by the Act." (Italics Court's) *Griffith* v. *United States* (May 3, 1974) Cir. #74-648, D.C. of District of Columbia. This same conclusion was approved in *United Jewish Org. of Williamsburgh* v. *Wilson* (2d Cir. 1975) 510 F.2d 512, 520, n. 15. Under this construction of the statute the action in *Harper* should have been dismissed at the outset.

[5] § 701, *et seq.*, 5 U.S.C.

[6] *See, Harper* v. *Levi* (D.C. Cir. 1975) 520 F.2d 53, 54-5.

[7] 520 F.2d at 58.

the Attorney General's initial decision not to interpose an objection, (2) the invalidity of that initial action of the Attorney General, and (3) the effectiveness of the objection to the legislation, entered by the Attorney General, in obedience to the decision of the District Court in that case some year and a half after the submission to the Attorney General under the Act, as an absolute bar to enforceability of the state legislation, absent successful prosecution of a suit for a declaratory judgment of the constitutional validity of such legislation. Under this argument, if sustained, we would be limited in the action we could take to enjoining the enforcement of the Act itself for failure to comply with the requirements of § 5 and to ordering the State to submit in a reasonable time an acceptable substitute reapportionment plan or, in default of such submission, to promulgating an interim plan of reapportionment of our own. The defendants assert, on the other hand, that collateral estoppel is not applicable and that this Court is free to exercise its own independent judgment on the question whether the failure of the Attorney General to interpose within sixty days an objection automatically authorized the State to enforce the Act.

It is obvious from this statement of positions that the first problem to be addressed is whether the defendants are precluded by collateral estoppel from asserting, contrary to the conclusions reached in *Harper* v. *Levi*, that the conditions of § 5 were satisfied when the Attorney General failed to interpose an objection within sixty days after submission to him of the Act. We conclude they are not so precluded. Our reasons for this conclusion follow.

There is no dispute with the proposition that, contrary to the earlier view based on a mechanical application of the principle of mutuality, the modern rule is that a valid judgment in a prior suit, involving the same issues may, by way of collateral estoppel, be asserted in a subsequent action by a stranger to the first suit against one who was a party or, in privity with a party, in that earlier action. And this is the rule of our Circuit, as stated in a number of decisions. *State of North Carolina* v. *Chas. Pfizer & Co., Inc.* (4th Cir. 1976), —— F. 2d ——; *Thomas* v. *Consolidation Coal Company* (1967) 380 F.2d 69, *cert. denied* 389 U.S. 1004, (1967), *reh. denied* 389 U.S. 1059 (1968); *Graves* v. *Associated Transport, Inc.* (4th Cir. 1965) 344 F.2d 894; and *see*, generally, 31 A.L.R. 3d 1044, *et seq.*[8] But this plea, it must be observed, is *only*

[8] There is some conflict in the decisions whether this claim of collateral estoppel by a stranger to the proceedings may be asserted offensively, as do the plaintiffs in this case, or is limited to defensive application. The Supreme Court noted the distinction between an offensive and defensive use of the plea in *Blonder-Tongue* v. *University Foundation* (1971) 402 U.S. 313, 330. It did not, however, decide whether the plea was limited in application to defensive assertion. Our Circuit similarly avoided resolving the issue for this Circuit in *North Carolina* v. *Chas. Pfizer & Co., supra.*

The leading case for use of collateral estoppel either offensively or defensively is *B. R. DeWitt, Inc.* v. *Hall* (1967) 19 N.Y. 2d 141, 225 N.E. 2d 195, 31 A.L.R. 3d 1035. The contrary view, limiting the plea to defensive use, is stated in Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 *Geo. Washington L. Rev.* 1010 (1967), in which the author states that "the judicial policies underlying collateral estoppel are generally subserved by allowing defensive assertion of the plea by a nonparty and

available against persons who were either parties to the prior judgment or, in privity with such parties.[9] The Supreme Court so declared recently in *Blonder-Tongue* v. *University Foundation, supra,* at 329:

> "Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position. See *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940); *Bernhard*, 19 Cal. 2d, at 811, 122 P.2d at 894."

The courts have, it is true, developed some exceptions to this rule by broadening the definition of privies under the rule to include persons not expressly named as defendants but whose conduct and intimate participation in the action justify their being so classified. But, "in order for a person not

frustrated by allowing offensive assertion, even though allowing the plea has the obvious effect of shortening the subsequent litigation in either case." A full list of relevant law review articles on the issue is set forth in 31 A.L.R. 3d at 1050 and 1051.

[9] *City of Richmond* v. *United States* (1975) —— U.S. ——, slip op., p. 14, n. 6; *Gratiot State Bank* v. *Johnson* (1919) 249 U.S. 246, 248-9; *Thomas* v. *Consolidation Coal Co., supra,* at 85; *Humphreys* v. *Tann* (6th Cir. 1973) 487 F.2d 666, 670-1, *cert. denied* 416 U.S. 956 (1974); *Scooper Dooper, Inc.* v. *Kraftco Corp.* (3d Cir. 1974) 494 F.2d 840, 844; *Bruszewski* v. *United States* (3d Cir. 1950) 181 F.2d 419, 422, *cert. denied* 333 U.S. 828 (1948) and 340 U.S. 865 (1950).

formally made a party to a suit to be estopped by the decision therein, he must either be in privity with a party thereto in the strict sense of the term or he must not only aid in the prosecution or defense of a suit, but have the right to participate and control such prosecution or defense." *Hy-Lo Unit & Metal Products Co.* v. *Remote C. Mfg. Co.* (9th Cir. 1936) 83 F.2d 345, 350. And this is the rule as it has been applied consistently in this Circuit. Thus, in *E. I. Du Pont de Nemours & Co.* v. *Sylvania I. Corporation* (4th Cir. 1941) 122 F.2d 400, 405, it was held that "mere assistance in the defense of a case is insufficient to bind a person not joined as a party;" it is only "participation in the trial and control of the litigation," which will "bind the participant" who is not "a party to the record." The same rule was restated in the later case of *Thaxton* v. *Vaughan* (4th Cir. 1963) 321 F.2d 474, 479, wherein the Court stated that the "mere appearance as a witness, or the supplying of an attorney," [10] is insufficient to bind a non-party by the judgment; [11] and that it is only "where a nonparty, * * * effectively controls the action" that "he may be bound by the result." [12] Other courts used a

[10] To the same effect: *Rumford Chem. Wks.* v. *Hygienic Chem. Co.* (1909) 215 U.S. 156, 160; *Council Brothers, Inc.* v. *Ray Burner Company* (5th Cir. 1973) 473 F.2d 400.

[11] *See, also, Bryson* v. *Guarantee Reserve Life Insurance Company* (8th Cir. 1975) 520 F.2d 563, 567.

[12] *See,* for instance, *Ritchie* v. *Landau* (2d Cir. 1973) 475 F.2d 151, 155, n. 2 ("[o]ne who, though not a party of record, controls in furtherance of his own self interest the conduct of adjudicatory proceedings by or against another is bound by the result of the proceeding"); *Drier* v. *Tarpon Oil Company* (5th

somewhat different formula in phrasing the exception, declaring that where one though not a formal party to the litigation, "had the initiative in a recognizably substantial litigation," he may be bound under the doctrine of collateral estoppel by the judgment entered therein. *Poster Exchange, Inc.* v. *National Screen Serv. Corp.* (5th Cir. 1975) 517 F.2d 117, 123. And they have defined "initiative" in this sense as "choice of forum." [13] Assuredly, if the criteria as stated in these cases are applied here, the defendants cannot be considered as either parties or privy to parties to the judgment in *Harper* v. *Levi* or bound by the decision in that case. They did not choose the "forum"; they did not assist in the defense; they did not participate in the trial; they were not consulted by the defendants on defense strategy; they did not appear as a witness or supply an attorney; and they unquestionably did not control the litigation in *Harper.* They were accordingly not within the exceptions to the rule as stated in *Blonder-Tongue.*

The plaintiffs argue, though, that the present defendants could have intervened in *Harper* and that because they failed to intervene, the defendants are bound by the decision in that case, even though not named as parties defendant and even though they were not participants in any way in that case. This,

Cir. 1975) 522 F.2d 199, 200 ("[p]rivity can be found if one party 'controlled the earlier lawsuit and its interests were represented by' the party to the first suit.")

[13] *See James Talcott, Inc.* v. *Allahabad Bank, Ltd.* (5th Cir. 1971) 444 F.2d 451, 461-2, *cert. denied* 404 U.S. 940 (1971); *Brightheart* v. *McKay* (D.C. Ct. 1966) 420 F.2d 242, 245, n. 4.

it must be said, is an unusual and novel twist to the doctrine of collateral estoppel. Its broad applications, if adopted, could create shocking situations and disturb long-established principles. Under this claimed extension of the doctrine of collateral estoppel, a person, who knows of a suit wherever filed, involving an issue affecting him, and though it may be that he cannot be served with process in that suit and made amenable to the jurisdiction of the Court, he, if he fails to intervene, can be concluded by the judgment in that case. Such an argument, so contrary to fundamental concepts of due process, can be justified neither in reason nor on authority and, whenever asserted, it has been consistently repudiated both in authoritative federal and state decisions. *Chase National Bank* v. *Norwalk* (1934) 291 U.S. 431, 444; *Gratiot State Bank* v. *Johnson, supra,* at 249-50; *Western Union Tel. Co.* v. *Foster* (1918) 247 U.S. 105, 115; *Brown* v. *Wright* (4th Cir. 1943) 137 F.2d 484, 487; *Gonzales* v. *Cassidy* (5th Cir. 1973) 474 F.2d 67, 76; *McGhee* v. *United States* (Ct. Cl. 1971) 437 F.2d 995, 1000; *Hatridge* v. *Aetna Casualty & Surety Company* (8th Cir. 1969) 415 F.2d 809, 812; *King* v. *Kings County Lafayette Trust Company* (E.D. N.Y. 1970) 323 F. Supp. 640, 648; *Pollard* v. *Roberts* (E.D. Ark. 1968) 283 F. Supp. 248, 254, *aff'd.* 393 U.S. 14 (1968); *Stott* v. *United States* (S.D. N.Y. 1958) 166 F. Supp. 851, 854; *United States* v. *Cohen* (S.D. Fla. 1967) 271 F. Supp. 709, 720; *State* v. *Fidelity and Casualty Company of New York* (1966) 268 N.C. 234, 150 S.E. 2d 396, 401; *O'Hara* v. *Pittston Co.* (1947) 186 Va. 325, 42 S.E. 2d 269, 280, 174 A.L.R. 945; *Sweeting* v. *Campbell* (1954) 2 Ill. 2d 491, 119 N.E. 2d 237, 240; *Crockett* v. *Harrison* (1960) 26 Ill. App. 2d 9, 167 N.E. 2d

428, 431; *Bannard* v. *New York State Natural Gas Corporation* (1961) 404 Pa. 269, 172 A.2d 306, 312; *Mixon* v. *Barton Lumber and Brick Company* (1956), 226 Ark. 809, 295 S.W. 2d 325, 329; 46 Am. Juris. 2d 680 ("[t]he right to intervene in an action does not, in the absence of its exercise, subject one possessing it to the risk of being bound by the result of the litigation, under the doctrine of res judicata.")

The opinion of Justice Brandeis, speaking for an unanimous Court in *Chase National Bank*, it would seem, should long ago have laid this argument to rest. There, he said (291 U.S. at 441):

> "* * * The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. Whether under the Ohio practice it would have been possible for the trustee to intervene, we have no occasion to determine. Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights."

In *Gratiot State Bank*, the same Justice had expressed the rule thus (249 U.S. at 249):

> "* * * The Trustee contends, however, that since by §§ 18b and 59f of the Bankruptcy Act, any creditor is entitled to intervene in the bankruptcy proceedings, the Bank should be considered a party thereto. * * * But he is under no obligation to intervene, and the existence of the right is not equivalent to actual intervention. Unless he exercises the right to become a party, he remains a stranger to the litigation and, as such, unaffected by the decision of even essential subsidary issues."

And this was stated as the rule in this Circuit in *Brown, supra,* at p. 487, where Judge Parker put it:

> "* * * And the fact that he may have had the right to intervene in the state proceeding is immaterial, since he did not in fact intervene or in any way make himself a party thereto."

To paraphrase *King,*[14] it "seems incredible," that the plaintiffs would press the argument that failure to intervene provides a basis for collateral estoppel in the face of such an array of final federal and state authorities. They, however, posit that *Penn-Central Merger Cases* (1968) 389 U.S. 486, supports their contention. We do not so understand this decision.

Penn-Central was an unusual case involving an attempted railroad consolidation under the terms of Section 407 of the Transportation Act of 1920, as amended, § 5(2)(b), 49 U.S.C., where various objections to the plan of consolidation were made in different jurisdictions. The New York Court, where most of the objections were centered, ruled on certain objections to the plan and the Supreme Court merely held that when it had affirmed "the decision of the New York court," that decision of the Supreme Court itself on those issues necessarily "preclude[d] further judicial review or adjudication of the issues upon which it [the Supreme Court] pass[ed]."[15] But this conclusion does not, we suggest, rest on collateral estoppel; it is no more than

[14] *King* v. *Kings County Lafayette Trust Co., supra,* 323 F. Supp. at 648.

[15] 398 U.S. 505-6.

a statement of the well-recognized relationship of the Supreme Court to the inferior federal courts and the effect of the former's decisions on those of the latter. The decision of the Supreme Court on the issues decided in *Penn-Central* unquestionably obligated all lower federal courts to follow that decision and "precluded" them from reaching a contrary conclusion or adjudication on the issues resolved therein by the Supreme Court. *See, Hicks* v. *Miranda* (1975) 422 U.S. 332, 344-5. In other words, the Supreme Court was simply stating the obvious fact that inferior courts may not reverse the Supreme Court or its rulings. That is the holding in that case, as we view it. So construed, it accords with established principles and provides no warrant for assuming that failure to intervene may be translated into a collateral estoppel against one not a party to the litigation. Of course, had *Harper* v. *Levi* been affirmed on appeal by the Supreme Court, we would, as an inferior federal court, be obligated to follow it, just as the Supreme Court in *Penn Central* said that all lower federal courts, confronted with the same issues decided by the Supreme Court therein, were bound to follow *Penn-Central.* But *Harper* v. *Levi* was not appealed and the Supreme Court did not affirm it. We are accordingly not obliged to follow it but may exercise our own judgment.

We now pass to the substantive issue, which is determinative of the plaintiffs' claim in this action. That issue is the reviewability at the instance of the plaintiffs of the Attorney General's decision not to interpose an objection to the State Senate's reapportionment statute within sixty (60) days after its submission. The Court in *Harper* v. *Levi* held, and the plaintiffs contend, that such decision was

reviewable at the instance of the plaintiffs under the Administrative Procedure Act. We do not.

§ 5 is silent on the reviewability of the action of the Attorney General as provided thereunder. In that event, one "affected adversely" by the action will be entitled to judicial review thereof under the Administrative Procedure Act, if such action is adjudicatory and the one affected thereby has no "other adequate remedy in a court" [16] unless there is "persuasive reason to believe that [non-reviewability] was the purpose of Congress." [17] In our view the action of the Attorney General under § 5, however, is (1) not adjudicatory, and (2) any party with standing, who was dissatisfied with his action, had an "adequate remedy in a court," and (3) there were not simply "persuasive" but compelling reasons to believe non-reviewability of that action was "the purpose of Congress."

That the action of the Attorney General is not adjudicatory follows from the fact that it is neither a final nor a definitive finding of any kind on the validity of the legislation submitted.[18] It decides nothing on the merits which can bind anyone.[19] The

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[16] 5 U.S.C. 704.

[17] *Abbott Laboratories* v. *Gardner* (1967) 387 U.S. 136, 140.

[18] *See, Columbia System* v. *U. S.* (1942) 316 U.S. 407, 424:

> "We need not stop to discuss here the great variety of administrative rulings which, unlike this one, are not reviewable—either because they do not adjudicate rights * * *."

[19] "The Attorney General [in making his determination] does not act as a court in approving or disapproving the state legislation." *Allen* v. *State Board of Elections, supra,* at 549.

determination of the Attorney General under § 5 has "no [more] binding legal consequence" than did the administrative action in *Ewing* v. *Mytinger & Casselberry* (1950) 339 U.S. 594, 600, *reh. denied* 340 U.S. 857 (1950), which, because it included "no binding legal consequence," and was not adjudicatory, was found not to be subject to judicial review.

Nor does the Attorney General's action operate to bar any party, whether it be the submitting State or political subdivision or a complaining private party, from maintaining in an appropriate proceeding its or his claim in reference to the validity of the submitted legislation. § 5 makes this especially clear with its proviso that "neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement * * *." The right of these plaintiffs to attack this State reapportionment act on constitutional grounds under the Fifteenth Amendment thus remained intact, unimpaired in the slightest by the Attorney General's determination, and expressly preserved by the specific language of § 5 itself. If the State which submits the legislation is dissatisfied with the Attorney General's determination, its "remedy in court," as declared in the section, is not judicial review of the Attorney General's determination but a declaratory judgment action in the District Court of the District of Columbia. In *Allen* v. *State Board of Elections, supra,* at 549-50, the Court made this abundantly clear:

> "If the Attorney General objects to the new enactment, the State may still enforce the legislation upon securing a declaratory judgment

in the District Court for the District of Columbia.

* * * *

"Once the State has successfully complied with the § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by § 5."

It cannot then be said that the plaintiffs, if denied the right of judicial review, are without an "adequate remedy in court" for the vindication of their rights under the Fifteenth Amendment. This "other adequate remedy" is far more immediate and more available than that available to an employer in a certification proceeding under the National Labor Relations Act, which has been held not reviewable under the Administrative Procedure Act, *see N.L.R.B.* v. *Clement-Blythe Companies* (4th Cir. 1969) 415 F.2d 78, 81-2, and the procedure which the Court said in *South Carolina* v. *Katzenbach* (1966) 383 U.S. 301, at 333, might be "a partial substitute for direct judicial review."

In *Klein* v. *Commissioner of Patents of United States* (4th Cir. 1973) 474 F.2d 821, 824, we declared that § 704, 5 U.S.C. of the Administrative Procedure Act, established "two essential elements as a prerequisite to judicial review: (1) final agency action and (2) no other adequate remedy in a court." It is plain the plaintiffs cannot satisfy either the requirement that the administrative decision be adjudicatory or the requirement that the plaintiffs be without "any other adequate remedy in court." Neither of those requirements for judicial review ap-

plies to the Attorney General's determination under § 5.[20]

There is another objection to judicial review of the Attorney General's determination at the instance of the plaintiffs. It is one that the District Court in *Harper* did not note and that the Court of Appeals on appeal glossed over without any real discussion. The right to judicial review under the Administrative Procedure Act is given only to one who is "adversely affected" or who has suffered "injury in fact" by the challenged administrative ruling. § 702, 5 U.S.C.; *Conservation Council of N. C.* v. *Costanzo* (4th Cir. 1974) 505 F. 2d 498, 501; *Duba* v. *Schuetzle* (8th Cir. 1962) 303 F. 2d 570, 574-5. However the Attorney General decides under § 5, that determination cannot, as we have seen, bar the rights of the plaintiffs to vindicate their rights in the courts. They are not "adversely affected" by the Attorney General's ruling. The only party which could be "adversely affected" by the Attorney General's determination, if adverse to the enforcement of the legislation, would be the State or political subdivision whose proposed change was denied clearance; and it would be only that State or political subdivision which would have standing to invoke

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[20] *See Common Cause* v. *Mitchell* (C.A. No. 2348-71, D.D.C. March 30, 1972) where the Court dismissed an attempt to review the Attorney General's determination with this reasoning:

> "* * * 42 U.S.C. § 1973c does not require the Attorney General of the United States to make determinations that are subject to the adjudicative and judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, (1971)."

judicial review, if such were available. And that is exactly what the same District Court which decided *Harper*, it would seem, held a year after it had decided *Harper*.[21] The plaintiffs would lack standing to request a review of the Attorney General's determination, if review were permissible.

The plaintiffs, however, cite the recent case of *Dunlop* v. *Bachowski* (1975) —— U.S. ——, 44 L. Ed. 2d 377, as supporting their contention that the action of the Attorney General under § 5 was reviewable at their instance. That case, far from supporting, actually illustrates, by contrast, the non-reviewability of the Attorney General's action under § 5. In *Bachowski*, the statute grants the Secretary of Labor authority to determine whether there were sufficient irregularities in a union election to justify a suit to invalidate that election and, if he does, he "shall" file suit for that purpose.[22] But the statute specifically provides that "[t]he remedy" thus provided "for challenging an [union] election already

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[21] *Griffith* v. *United States, supra.*

See, also, United Jewish Org. of Williamsburgh v. *Wilson, supra,* at 520, n. 15, approving the result in *Griffith*:

> "Indeed, a lawsuit was instituted directly in the District of Columbia District Court by some individual assemblymen from Kings County when New York's Attorney General decided not to sue on behalf of the State to overturn the April 1, 1974, order. This suit was summarily dismissed for lack of standing. Griffith v. United States, Civil No. 74-648 (D.D.C. May 3, 1974). This clearly seems proper under Allen v. State Board of Elections, 393 U.S. at 561, 89 S. Ct. 817."

[22] 29 U.S.C. § 482.

conducted shall be exclusive." [23] In short, the action of the Secretary is absolute and final, and unless his finding supports a suit and he decides to sue, any member, who may have filed the complaint prompting the Secretary's investigation, is completely without any remedy in any court; he is absolutely at the mercy of the Secretary and his decision for the vindication of his rights with reference to the election.[24] Under those circumstances, the Court properly found a right of judicial review of the Secretary's decision. But here, the action of the Attorney General forecloses no one's rights to pursue his claim "in a court;" indeed, it cannot affect in the slightest that right. All parties have, after the Attorney General's action, the same judicial remedy they had before his action was taken and those rights cannot be barred or prejudiced by the action of the Attorney General. *Bachowski* involved a procedure entirely different from that created under § 5.

Beyond this, the express language of § 5, as well as its legislative history, provides, as we have said, not simply "persuasive" but compelling reason to believe Congress did not intend that this determination by the Attorney General should be subject to the delays that would follow from judicial review. The legislative history relating to the inclusion of this provision in § 5 demonstrates that Congress intended thereby, as the Supreme Court in *Allen* phrased it, to give "the covered State a rapid method

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[23] 29 U.S.C. § 483.

[24] *Cf., Schonfeld* v. *Wirtz* (S.D. N.Y. 1966) 258 F. Supp. 705, 708.

of rendering a new state election law enforceable" [25] without any of the delays incident to resort to the courts in any forum. The legislative purpose, as set forth in the provision, was to avoid the very judicial hearing, with its attendant delay, for which the plaintiffs argue. The legislative hearings, during which the provision was developed, confirm this conclusion. References were repeatedly made during these early hearings to the delays that resort to the courts would entail in the enforcement of changes in a State's election procedures. There was growing disquiet in the committee over the extraordinary power being accorded for intrusion by the federal government through a veto on state legislative power as the hearings proceeded. This criticism of § 5, as it appeared in the original version submitted to the Congress by the Department of Justice, apparently came to a head during an appearance of the Attorney General before the Senate Judiciary Committee. The Attorney General conceded that the delays incident to judicial clearances of state legislation on voter qualification and election standards would "take[s] a long time" and "[i]n the interval the purposes of the act are frustrated." He then suggested, as an answer to the objection and as an expeditious means of securing an administrative clearance that would obviate the delays of any judicial proceedings and would in a proper case give clearance for immediate enforcement of the State legislation, the addition to the section of a provision "giving the Attorney General discretion" to pass on

[25] 393 U.S. at 549.

[26] *See,* H.R. Rep. No. 439, 89th Cong., 1st Sess. 38 (1965).

such laws and to deny clearance "only to those laws which the Attorney General takes exception to within a given period of time." [27] This suggestion by the then Attorney General, who was the sponsor and had original responsibility for the drafting of the Act, was the genesis of that provision of § 5 which gives to the Attorney General the power to clear for immediate enforcement State legislation submitted by a State covered by § 4 of the Act. If the legislative purpose of including this provision was, as it seems plain it was, to make available a remedy that would not be subject to court delay and yet not bar the rights of any party with standing to defend or attack the State law in a proper proceeding, that pur-

[27] The statement of the Attorney General was:

"* * * The effort [underlying § 5] is to prevent this constant slowing down process which occurs when States enact new laws that may clearly be in violation of the 15th amendment, but you have to go through the process of getting judicial determinations of that. It takes a long time. In the interval the purposes of the act are frustrated.

"Now, there may be better ways of accomplishing this [than relying solely on the declaratory judgment procedure]. * * * There are * * *, a good many provisions of State law, that could be changed that would not in any way abridge or deny the [Fifteenth Amendment] right; * * * perhaps this could be improved by applying it [the declaratory judgment procedure] only to those laws which the Attorney General takes exception to within a given period of time. Perhaps that would remove some of the burden."

Senate Hearings at p. 237.

pose would be defeated by holding that the Attorney General's action was subject to judicial review.[28]

Judicial review of the Attorney General's determination, if intended by Congress, would, too, require the Attorney General to state more "explicit the basis" and reasoning for that determination. This is true, because, as the Court emphasized in *Dunlop*,[29] such supporting findings and reasoning are essential to judicial review. In no other manner could the court determine whether the determination of the Attorney General was based on "substantial evidence" and lacking in arbitrariness. But § 5 imposes no duty on the Attorney General to make such explicit findings and we read *Georgia* v. *United States* (1973) 411 U.S. 526, 536, as holding that the statute imposes none. In fact, the statute does not require the Attorney General either to object or

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[28] The delays that would follow, if judicial review of the Attorney General's determination were found to exist, are well illustrated by the record in *Harper*, which involved no real factual review but concerned only an issue of law. The action was begun in the District Court in August, 1972, but the District Court, though the parties submitted the case on an agreed statement of facts, did not decide it until the middle of May, 1973, almost ten months later. The appeal from that decision was not heard until September, 1974, and the opinion of the Court of Appeals was not filed until the end of July, 1975. In other words, the right of the State to enforce its legislation, if § 5 is to be construed as plaintiffs contend and as *Harper* held, would have been delayed from May 2, 1972 to end of July, 1975, a period of over three years. It was this very delay, so graphically demonstrated by the record in this case which Congress, by providing for Attorney General clearance, sought to avoid.

[29] Slip Opinion, p. 10.

not to object; he can be silent and, at the completion of sixty days from date of submission, the State or political subdivision may proceed to enforce the legislation.[30] That result is entirely inconsistent with any notion that the Attorney General must give reasons for his determination. To repeat, reviewability would frustrate the plain Congressional purpose.[31]

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[30] *See, State Board of Election Commissioners* v. *Evers* (1972) 405 U.S. 1001 at 1003-4 (Blackmun, J., concurring):

> "I am unable so to read § 5 of the Voting Rights Act of 1965, and I cannot subscribe to the District Court's reasoning. Section 5, it seems to me, plainly and clearly provides that if the proposal has been properly submitted to the Attorney General, as it was, 'and the Attorney General has not interposed an objection within sixty days after such submission,' as he did not, the proposed statutory changes 'may be enforced' without the court's proceeding in the District of Columbia and without resubmission to the Attorney General. Here the proposal was properly submitted to the Attorney General and he took no action by way of interposing an objection within the allowed 60 days. I do not see how the statute can be read or construed in any way other than to the effect that the conditions of its proviso were fulfilled and that the proposed new legislation was thereby enforceable, subject, of course, to the statute's recognized exception as to any contest on the merits."

[31] It is interesting that the plaintiffs in the thoroughly briefed case of *United Jewish Org. of Williamsburgh* v. *Wilson, supra*, at 520, n. 16, did not argue the reviewability of the Attorney General's determination:

> "Appellants do not urge that a Voting Rights Act determination of the Attorney General is reviewable under the Administrative Procedure Act, probably because they concede it to be 'committed to agency discretion by law.' 5 U.S.C. § 701(a)(2). Analogous determinations under § 407 of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6,

There is another troublesome matter that arises if the plaintiffs' theory is upheld. It would seem axiomatic that, if the plaintiffs have the right to judicial review of the Attorney General's determination, the State must have a like right. Just one party to a controversy cannot be given a right to review; the right must be equally available to both parties. Yet, it has been consistently assumed in all the decisions involving § 5 that, in the event the Attorney General objects to a State law, the State's sole and exclusive remedy is a declaratory judgment action in a three-judge District Court of the District of Columbia. *See Allen* at 562; *Georgia* v. *United States* at 541, n. 13; *United Jewish Org. of Williamsburgh* v. *Wilson* at 520. But under any theory of the reviewability of the Attorney General's determination, re-

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have been held not subject to judicial review. United States v. Greenwood Municipal Separate School Districts, 406 F.2d 1086 (5th Cir. 1969)."

The Court might well have added a reference to the determination by the Attorney General authorized under § 2000a-5, 42 U.S.C., Civil Rights Act of 1964. That determination is very analogous to the determination by the Attorney General under § 5. Under § 2000a-5 the requirement that the Attorney General certify that he has reasonable cause to believe that the defendant has engaged in a pattern or practice of resistance to the full and equal enjoyment of any rights secured by that statute, preliminary to the institution of an action by the Attorney General under that Act, is even more final and definitive on the rights of the adverse party than the Attorney General's determination under § 5. That determination, however, has been uniformly held to be conclusive and not subject the judicial review, since the defendant has a right to defend in court the basic issue of the existence of a pattern of resistance on his part. *United States* v. *Gray* (D.R.I. 1970) 315 F. Supp. 13, 24.

view would be before a single District Judge. This certainly would be the result if *Harper* v. *Levi* were followed, and would be contrary to the decision in *Allen*, which declares that the State's only remedy is before a three-judge court.

In sum, the determination made by the Attorney General under § 5 is not reviewable and, when he failed within sixty (60) days after submission to interpose an objection to the South Carolina Senate reapportionment as provided in Act 1205, the State of South Carolina was automatically authorized to enforce it; subject to the right of any proper party or parties to assail the constitutional validity of that legislation in an appropriate action.

The plaintiffs are accordingly not entitled to an injunction against the enforcement of the legislation by the defendants at this time and the complaint is dismissed.

And It Is So Ordered.

APPENDIX B

Opinion in *Twiggs* v. *West*, Civ. No. 71-1106 (D.S.C. Apr. 7, 1972)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Actions Nos. 71-1106, 71-1123, 71-1211

MAGGIE H. TWIGGS,
Plaintiff,

—versus—

JOHN C. WEST, Governor of South Carolina, O. FRANK THORNTON, Secretary of State of South Carolina, EARLE E. MORRIS, Lieutenant Governor, President of the South Carolina Senate, and LOVICK O. THOMAS, Clerk of the Senate of the South Carolina General Assembly,
Defendants.

and

DANIEL R. MCLEOD, individually and on behalf of all others similarly situated and as Attorney General of the State of South Carolina,
Plaintiff,

—versus—

JOHN C. WEST, Governor of the State of South Carolina, EARLE E. MORRIS, JR., Lieutenant Governor of the State of South Carolina and President of

the South Carolina Senate, LOVICK O. THOMAS, Clerk of the South Carolina Senate, and G. P. CALLISON, MRS. MARGARET TOWNSEND, MRS. MARTHA C. CHAPMAN, EDGAR L. MORRIS, and ERNEST A. FINNEY, as members of and constituting the South Carolina State Election Commission,
Defendants.

GILBERT E. MCMILLAN and C. KENNETH POWELL,
Plaintiffs-Intervenors.

and

MATTHEW D. MCCOLLUM, TOBIAS GADSEN, FLOSSIE GORDON, EUGENE CAMPBELL, LEVI G. BYRD, JAMES CRAWFORD, SAMUEL BOLDEN, LEVERNE STEVENSON, QUINCY SMITH, WILLIAM MCKINLEY BOWMAN, JOHN ROY HARPER, II, W. F. GIBSON, MOSES DILLIARD, JERRY WILSON, I. DAY WATSON, MRS. VICTORIA DELEE, MRS. DOROTHY L. MATTHEWS, MRS. RACHEL H. JOHNSON,
Plaintiffs,

—versus—

JOHN C. WEST, Governor of the State of South Carolina; EARLE E. MORRIS, JR., Lieutenant Governor of the State of South Carolina and President of the South Carolina Senate; LOVICK O. THOMAS, Clerk of the South Carolina Senate; and G. P. CALLISON, MRS. MARGARET TOWNSEND, MRS. MARTHA C. CHAPMAN, EDGAR L. MORRIS and ERNEST A. FINNEY, JR., as members of and constituting the South Carolina State Election Commission,
Defendants.

Before HAYNSWORTH, Chief Judge, Fourth Judicial Circuit, and RUSSELL, Circuit Judge, and MARTIN, Chief District Judge, District of South Carolina.

The plaintiffs challenge the constitutional validity of an Act of the General Assembly of South Carolina enacted November, 1971. Such Act provides alternative plans for the reapportionment of the State Senate to accord with the 1970 census. The two plans are designated in the Act as Plan A and Plan B. The second plan (Plan B) is only to be followed in the event Plan A is found wanting in constitutionality. Both plans combine single and multi-county districts. The only substantial difference in the two plans is a rearrangement in the multi-county districts, with a corresponding change in the maximum variances from approximately 24% in Plan A to 19% in Plan B.

The original action, seeking a declaratory judgment of invalidity of both plans, was begun by the Attorney General of South Carolina, in his individual status as a citizen and in his official capacity, acting under a resolution of the State Senate. The plaintiff Maggie H. Twiggs instituted a similar action shortly afterwards. In both actions, the plaintiffs moved for the appointment of a three-judge court as required under Section 2281, 28 U.S.C. A three-judge court was duly constituted and the two actions, presenting identical questions, were consolidated. Gilbert E. McMillan and C. Kenneth Powell, as Chairman of the South Carolina Republican Party, have properly intervened in the consolidated action in support of

the claim of invalidity. In addition, the plaintiff Matthew D. McCollum, suing as a citizen-voter of South Carolina, has filed a separate action, in which he joins in the attack on the reapportionment act, asserting both the grounds set forth by the other plaintiffs in their complaint and the added claim of illegal discrimination under the Fifteenth Amendment. This plaintiff, also, raised the issue of the applicability of the Voting Rights Act of 1965. He concludes with a prayer for a prompt judicial reapportionment. Though this latter action has not been consolidated with the other two actions, the three actions have been litigated together, throughout.

The defendants in all three cases are John C. West, Governor of the State of South Carolina; Earle E. Morris, Jr., Lieutenant Governor of the State of South Carolina and President of the South Carolina Senate; and Lovick O. Thomas, Clerk of the South Carolina Senate.[1]

Hearings have been held, testimony taken, and various exhibits prepared and admitted into the record. All parties have moved for judgment in their favor on the basis of the record so made. Extensive briefs have been filed in support of these motions for judgment and oral arguments have been heard from all parties. We conclude that the plaintiffs are

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[1] In the Twiggs case, O. Frank Thornton, Secretary of State of South Carolina is named as a defendant.

In the McLeod and McCollum cases, G. P. Callison, Mrs. Margaret Townsend, Mrs. Martha C. Chapman, Edgar L. Morris and Ernest A. Finney, as members of and constituting the South Carolina State Election Commission, are named as defendants.

entitled to a declaratory judgment that the Act in question violates the Fourteenth Amendment and is accordingly invalid. We delay further relief in order to permit the General Assembly of South Carolina a reasonable opportunity to reapportion the State Senate.

The jurisdiction of this Court, as constituted under Sections 1331, 1343, 28 U.S.C. and Sections 1973(c), 1981, 1983, 1988, 42 U.S.C., so far as claims of invalidity under the Fourteenth and Fifteenth Amendments are concerned, is conceded. Prior to final arguments, the Attorney General of the United States had refused to approve the Act under the terms of the Voting Rights Act of 1965. The defendants stated, during argument, that they intended to contest that decision of the Attorney General in the District Court of the District of Columbia, which, by law, is the proper forum for review under the terms of the Voting Rights Act of 1965. We shall accordingly not consider the claims of the plaintiff McCollum, under the Voting Rights Act, but shall confine our consideration to the claims of invalidity under the Fourteenth and Fifteenth Amendments, which admittedly are properly before this Court.

Turning to the merits of the controversy: All the plaintiffs unite in challenging the validity of both Plan A and Plan B under the Equal Protection Clause of the Fourteenth Amendment, as applied in *Reynolds* v. *Sims* (1964) 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506, reh. den. 379 U.S. 870-1. In *Sims*, the Supreme Court laid down the rule that, while "mathematical exactness" in the apportionment of legislative seats by a State was not required, the State must "make an honest and good faith effort

to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." [2] The standard of "as nearly as practicable" has been construed to mean "that the State make a good-faith effort to achieve precise mathematical equality" [3] and permits "only the limited population variances (among districts) which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." [4] The minor variances in population allowable must be based on legitimate considerations incident to the effectuation of a rational state policy [5] and be "free from any taint of arbitrariness or discrimination". [6] Rational policy requires, "logical, internally consistent rules consistently applied, not merely a rule of reason grounded on general considerations of fair representation." [7] "Even where there are theoretically valid rationales for deviating from exact population equality, those rationales must themselves be applied systematically throughout the state, not in an ad hoc

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[2] *Reynolds* v. *Sims, supra,* at p. 577. "Practicability" does not mean political practicality, for, as the Court put it in *Kirkpatrick* v. *Preisler* (1969) 394 U.S. 526, at p. 533, 89 S.Ct. 1225, 22 L.Ed.2d 519, reh. den. 395 U.S. 917: " 'The rule is one of 'practicability' rather than political 'practicality'."

[3] *Kirkpatrick* v. *Preisler, supra,* at pp. 530-1.

[4] *Kirkpatrick* v. *Preisler, supra,* at p. 531.

[5] *Reynolds* v. *Sims, supra,* at p. 579.

[6] Cf., *Roman* v. *Sincock* (1964) 377 U.S. 695, 710, 84 S.Ct. 1449, 12 L.Ed.2d 620.

[7] Dixon, *The Warren Court Crusade for the Holy Grail of "One Man-One Vote"*, S.Ct. Rev. 219, 242 (1969).

manner in certain places and not at all in others." [8] And the burden of justifying any variance, however small, must rest on the state.[9] In sum, the Equal Protection Clause "requires mathematical equality subject only to unavoidable deviations for acceptable reasons and then only if the deviations are within tolerable limits." *Jackman* v. *Bodine* (1970) 55 N.J. 371, 262 A. 2d 389, 395.[10]

While it is recognized that "a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering" and "to maintain the integrity of various political subdivisions",[11] a desire merely to preserve county lines in a reapportionment plan, in and by itself, is not a sufficient justification for a population deviation.[12] "Population is, of necessity, the

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[8] *Graves* v. *Barnes* (3 Judge Ct., D.C. W.D. Tex., Jan. 28, 1972) —— F. Supp. ——, stay denied, Powell, J., —— U.S. ——, (Feb. 7, 1972).

[9] *Swan* v. *Adams* (1967) 385 U.S. 440, 443-444, 87 S.Ct. 569, 17 L.Ed.2d 501.

[10] Cf., Bickel, *Politics and The Warren Court* (New York, 1965) p. 181, where the author states that the question "with apportionment, as with racial relations, is not one of rationality. It is rather, what principles restrict otherwise rational choices that a legislature might make."

[11] *Reynolds* v. *Sims, supra,* at p. 581 and 578; cf., though, *Kirkpatrick* v. *Preisler, supra,* at p. 534.

[12] *Kirkpatrick* v. *Preisler, supra,* at pp. 533-534; *Wells* v. *Rockefeller,* (1969) 394 U.S. 542, 89 S.Ct. 1234, 22 L.Ed.2d 519; *Hensley* v. *Wood* (D.C. Ky. 1971) 329 F. Supp. 787; *Wold* v. *Anderson* (3-Judge Ct. Mont. 1971) 327 F. Supp. 1342; *Howell* v. *Mahan* (3-Judge Ct. Va. 1971) 330 F. Supp. 1138.

starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies" [13] and it is only when the formulation of a plan giving equality is impracticable or unworkable that a state can rationally consider according to political subdivision some independent representation in at least one body of the state legislature. The rule, simply stated, is that the Legislature must select the best plan the constitutional thesis of one man-one vote will permit, "and the best plan is the one with the least population deviation." *Jackman* v. *Bodine, supra,* at p. 395.

Manifestly, Plan A, which has a maximum variance [14] of approximately 24 per cent does not meet the standards fixed in *Sims* and the subsequent decisions of the Supreme Court. The Legislature itself, with its Plan B, having a population variance of approximately 19%, demonstrated that it was practicable and workable to devise an apportionment plan reducing the population variances among districts below those used in Plan A. Both legislative plans maintain the integrity of county lines. Both plans are formulated along similar lines, with both single and multi-member districts. Plan B does reduce by one the number of districts and does increase in three instances the political subdivisions included in multi-member districts in Plan A. Thus, in Plan A, Laurens County is designed as a senatorial district,

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[13] *Reynolds* v. *Sims, supra,* at p. 567.

[14] Maximum variance, as used herein, defines the total difference between the two districts at the extreme deviations in the Plan. See, *Grisbaum* v. *McKerthen* [*sic*] (D.C. La. 1971) 336 F. Supp. 267, 272; and Dixon, *The Warren Court Crusade for the Holy Grail of "One-Man-One Vote"*, S.Ct. Rev. 219, 233, n. 50 (1969).

even though it is thereby over-represented 11.7% and Newberry and Union Counties are combined into a single-senator district, though the district is under-represented 3.9%. By combining in Plan B the Contiguous Counties of Laurens, Union and Newberry into a district to which two senators are allotted, the variance for the multi-district is fixed at 3.9%. Similarly, Chester and Fairfield Counties, combined in Plan A, as a single-senator district, are over-represented by almost 12%, whereas Richland County, to which 4 senators are assigned, is under-represented by 3.8%. The three counties are combined under Plan B into a 5-member district, in which there is less than a 1% variance. By small changes such as these, Plan B, observing, as we have seen, the same principles as Plan A in its construction, substantially reduces the population variances among the districts. Plan B thus establishes that the Legislature could have devised an acceptable plan, with less population variance than represented in Plan A. That fact is sufficient to render Plan A invalid. See *Kilgarlin* v. *Hill* (1967) 386 U.S. 120, 124, 87 S. Ct. 820, 17 L. Ed. 2d 771, reh. den. 386 U.S. 999.

That leaves for consideration Plan B. Again, all the plaintiffs join in asserting the constitutional infirmity in this Plan. Not only is it practicable, they assert, to achieve a more exact population equality, particularly through the use of single member districts, but, in addition, the special provisions of the plan, imposing residency qualifications and requiring use of numbered seats in multi-member districts, are constitutionally invalid. The plaintiff Matthew D. McCollum adds the claim that the Plan, taken in its entirety, is violative of his Fifteenth Amendment rights.

Though not in the same degree, Plan B, even as Plan A, is open to the argument that its population variances are excessive. The suggestion by the defendants, based on the earlier cases enunciating the one-man-one-vote rule, that maximum variations as large as those in Plan B (i.e., 19%)[15] have been approved—indeed, that such variances were approved in an earlier case involving the apportionment of the very body with which we are dealing—overlooks the fact that those deviations antedated *Kirkpatrick* v. *Preisler*,[16] *Wells* v. *Rockefeller*[17] and *Abate* v. *Mundt*,[18] in which the Supreme Court tightened and

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[15] In Plan B, the maximum variance between Districts 12 and 16 is 19%, between 14 and 15 is 18%, and between 17 and 19, is 14.5%. These six districts embrace approximately 30% of South Carolina's population. Districts 3 and 4, accounting for approximately 20% of the State's voting population, have a variance of 13.3%. Cf., *Kilgarlin* v. *Hill, supra*, at p. 125, referring to under-representation in Dallas and Bexar Counties (Texas) of 6.42% and 7.59%. Moreover, the variances were greatest in the counties of the State which the State demographer found were likely, based on past exeprience, to show the greatest growth in population during the greatest growth in population during the next decade. Whether such evidence is sufficiently authenticated to be considered is contested by the defendants (cf., *Kirkpatrick* v. *Preisler, supra*) and we do not base our conclusion on such evidence.

[16] 394 U.S. 526.

[17] 394 U.S. 542.

[18] 403 U.S. 182. *Preisler* and *Wells* concerned congressional districting but, as the commentator observed in Note, *Effective Representation and Multimember Districts*, 68 Mich. L. Rev. 1577, 1591 (1970). "Although these cases dealt with congressional districts, there is no reason to believe that the same principles are not applicable to state legislative dis-

refined its prior standards of acceptable variances.[19] Whatever may have been the earlier imprecision in the decisions, these later cases have indicated certain general limits within which legislative bodies must operate in formulating apportionment plans. Thus, in *Abate*, the Court, giving effect to a long history of maintaining the integrity of political subdivisions, approved a maximum variance of 11.9%. A local legislative body was involved and the Court recognized that "slightly greater percentage deviations may be tolerable for local government apportionment schemes" than in the case of national or state leg-

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tricts * * *." This conclusion is reinforced by the fact that in *Ely* v. *Klahr* (1971) 403 U.S. 108, 111, 91 S.Ct. 1803, 29 L.Ed.2d 352, the Court in reviewing a plan for the reapportionment of the Arizona legislature with a variance of 16%, said: "The court properly concluded that this plan was invalid under *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969) and *Wells* v. *Rockefeller*, 394 U.S. 542 (1969) * * *." See, also, *Grisbaum* v. *McKeithen, supra;* cf., however, *Reynolds* v. *Sims, supra,* p. 378.

[19] See Dixon in *Apportionment in the 70s* (U. of Cal. Press 1971), p. 18:

> "Any lingering doubts about the mathematical rigidity of the Supreme Court approach were substantially undercut by the 1969 congressional districting cases. *Kirkpatrick* v. *Preisler* and *Wells* v. *Rockefeller*, and the 1970 federated college district case, *Hadley* v. *Junior College District*."

See, also, *Skolnick* v. *Illinois State Electoral Board* (3-judge Ct. Ill. 1969) 307 F. Supp. 691; *Driggers* v. *Gallion* (D.C. Ala. 1969) 308 F. Supp. 632; *Beens* v. *Erdahl* (3-judge Ct. 1972) 336 F. Supp. 715, 719; *Sims* v. *Amos* (3-judge Ct. Ala. 1972) 336 F. Supp. 924, 937.

islative bodies.[20] On the other hand, in *Wells* v. *Rockefeller*, which involved a Congressional reapportionment, the maintenance of existing county lines was held insufficient justification for a 12.1% variance. Justice White, who would have sustained the apportionment plan in *Wells*, dissented, stating, "As a rule of thumb, a variation between the largest and the smallest district of no more than 10% to 15% would satisfy me, absent quite unusual circumstances not present in any of these cases."[21] Considering *Preisler* and *Wells* together, it would seem that, barring some extraordinary situation, 12 per cent ordinarily represents the outer limits of permissible variance, certainly in Congressional districting. Justice White, in his dissent, would apparently extend these limits to 15%. Plan B exceeds the permissible limits of both *Abate* and *Wells* by approximately 50 per cent; it is also in excess of the outer limits of Justice White's "rule of thumb". It can only be sustained for some "quite unusual circumstances."

The record offers at best a questionable basis for a finding of "unusual circumstances". The variances cannot be justified on any theory of preserving county lines, assuming that such fact may justify deviation. A number of plans, in all of which county lines were observed, were presented and considered by the Legislature.[22] Most of these alternate

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[20] 403 U.S. at p. 185.

[21] 394 U.S. at p. 553.

[22] *Kilgarlin* v. *Hill* (1967) *supra*, at p. 124, indicates that Courts should, in reviewing a legislative plan, consider other plans that may have been before the legislature and, if such

plans considered by the Legislature had variances well below the 12% range.[23] The only reason suggested at argument for refusing to adopt one of these plans providing less population variance was that, to have done so, would have resulted in a slight reduction in election districts and a correspondingly slight increase in one or two instances of the number of counties in a multi-member district. Compactness is a factor that may be considered in preparing a state legislative apportionment plan.[24] The Legislature had, however, already recognized the feasibility of multi-county districts and had reduced the number of election districts from those prescribed in the State Constitution both under the apportionment plan under which the present State Senate is operating and under the two plans proposed in the legislation under attack. As a matter of fact, the usual manner of conforming reapportionment plans to constitutional standards as enunciated in *Sims* has been by the creation of multi-county districts with, in most cases, multi-member legislators.[25] And such groupings of contiguous counties have often been found to meet the justification of

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plans involved less population variance than the plan adopted, the Court should state "satisfactory grounds" for finding that such plans were impracticable.

[23] In this case, 4 of the 7 plans of apportionment formally introduced in the Legislature had variations less than either Plan A or Plan B. Similarly the Reapportionment Committee of the General Assembly had submitted to it 13 plans, all with smaller variances than either Plan A or Plan B.

[24] *Reynolds* v. *Sims, supra,* pp. 578-9.

[25] Bickel in *Reapportionment in the 1970s* (U. of Cal. Press 1971). p. 70.

compactness. In *Fortson* v. *Dorsey* (1965) 379 U.S. 433, 435, 85 S. Ct. 498, 13 L. Ed. 2d 401, for instance, the multi-member districts included as many as eight counties and there were alloted to some districts as many as seven senators. None of the plans considered by the Legislature in this case involved such large groupings of counties or provided for as many senators. All the plans considered did not represent excessive variations either in size of multi-county districts or in multiple senators by comparison with the two plans approved or, for that matter, with the plan of apportionment under which the Senate is now constituted. The fact that a county or two may have been added to a district or that the number of senators allocated to a district is increased cannot easily be justified as such a change in principle or in operation as to render a plan either impracticable or unworkable. It is not clear that, in determining on the practicality of a plan of reapportionment, both in connection with Plan A and Plan B, the Legislature accepted population equality as "the starting point for consideration and the controlling criterion for judgment in" this legislative apportionment controversy,[26] and we are not prepared to find that it has sustained its burden of establishing that in Plan B it has constructed the "best plan" providing the least practical population variance. For reasons hereafter stated, both Plans include as an integral part thereof an invalid provision. Because of the invalidity of this provision, the General Assembly will likely wish to review its Plans and, in connection therewith, may

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[26] *Reynolds* v. *Sims, supra,* at p. 567.

hopefully prepare a plan that accords more with the principles stated *supra* and will represent a proper adherence to the principle that population equality in electoral districts are "the controlling criterion" to be employed in the formulation of its plan.

Both Plan A and Plan B include residency provisions which are manifestly invalid. Plan A contains what the parties refer to as a "positive residence" provision. Under this provision, Florence County, with a population of 89,636 and included in a three-county district with an allocation of three senators, may have two resident senators. On the other hand, Aiken County, with a slightly greater population (i.e., 91,023), included likewise in a three-county district but with an assignment of only two senators, can have only one resident senator. Plan B has what the parties describe as a "negative residence" provision, under which, for instance, three counties—Cherokee, Clarendon and Georgetown—with a population less than the number required for the allotment of a senate seat would be guaranteed a *resident* senator. Twenty-six other counties, also without a population sufficient to permit them to have their own senator, would not have guaranteed to them a *resident* senator. Such patently capricious and arbitrary disparities between the voters and candidates in similarly situated counties are clearly violative of constitutional principles. If there is special value to the voter in having a *resident* senator, if Sims' goal of "fair and effective representation" has any relation to the residence and territorial availability of the senator—and it is argued there is such relation—then these residency clauses in both plans, discriminating as they do among the

voters and candidates in similarly situated counties must be found invalid, absent some compelling or rational justification.[27] The record, as established in this proceeding, however, is barren of any compelling—or even rational need justifying this disparity and discrimination in rights.[27a]

It is fundamental that, "the right to vote freely for the candidate of one's choice is of the essence of a democratic society"; any restrictions on that right strike at the heart of representative government.[28] Within recent weeks, the Supreme Court, reaffirming what had been previously held "in decision after decision", including *Sims*, has declared again that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."[29] Moreover, "If a citizen is entitled to vote and have his vote count, he is entitled to vote for any candidate of his choice, subject to reasonable conditions and qualifications imposed by the State."[30] "Diluting the weight

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[27] See, Dixon, *Democratic Representation* (Oxford Press, New York, 1968), p. 513, where the author finds unequal residential subdistricts for elections to state legislature invalid, and, again, in *Reapportionment in the 70s* (U. of Cal. Press, 1971), p. 28, where the same author comments that "this unequal residence device restricts political candidacy * * *."

[27a] *Dunston* v. *Scott* (3-judge Ct. N.C., 1972) 336 F. Supp. 206, 212.

[28] *Reynolds* v. *Sims, supra,* at p. 555.

[29] *Dunn* v. *Blumstein,* —— U.S. ——, 40 L.W. 4269, at p. 4271, filed March 21, 1972.

[30] *Socialist Labor Party* v. *Rhodes* (3-judge Ct., Ohio, 1968) 290 F. Supp. 983, 987 modified on other points, 393 U.S. 23.

of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race (cases cited) or economic status (cases cited)." [31] Balancing of "urban and rural power in the legislature" or of small versus large counties will not justify a discrimination in voting rights.[32] That the residence clauses do discriminate both among small counties and between the small and larger county is plain. In only three instances may any of the 29 counties not qualifying by population for a senate seat be guaranteed under Plan B *resident* senators. In all the large counties included in multi-county districts the voters are limited, in terms of residence of candidates, in their right to exercise of their sufferage "to vote for any candidate of his (their) choice." The effort thus to favor the smaller county by this discriminatory limitation on the right of suffrage through the use of residency provisions is an unreasonable restriction at variance with the command of equal protection set forth in the Fourteenth Amendment that infects both Plans A and B.

Neither *Fortson* v. *Dorsey*, *supra*, nor *Dusch* v. *Davis*, *supra*, though cited by the State in support of these residency provisions, can sustain the discrimination arising out of the application of these residency requirements. In Fortson, certain districts had multiple members. These districts were, however, divided into subdivisions and the apportionment

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[31] *Sims*, 377 U.S. at p. 566.

[32] *Davis* v. *Mann* (1964) 377 U.S. 678, 692; *Driggers* v. *Gallion*, *supra*, at p. 634.

plan provided that there should be a *resident* senator from each of these subdivisions. The subdivisions all had a population which substantially qualified them to elect a senator, though such senator, under the reapportionment plan, had to be elected by all the voters of the district. As this Court observed in an earlier case involving this same contention, this case "seems comparable to this, except for the crucial fact that the subdivisions of the voting unit there (to which there was allotted a resident senator) were apprximately [*sic*] equal in population." [33] *Dusch* is even more inapposite. It dealt with a local governmental unit. It is well settled that the strict principles of *Preisler* and *Wells*, with which state legislative apportionment plans such as that involved here must comply, "need not be applied to smaller specialized districts * * *",[34] and *Dusch* simply recognizes and upholds "the States' need for flexibility in structuring local units", a need which "became (becomes) greater as we proceed down the spectrum from the state legislature to the single-purpose local entity".[35] The rationale of *Dusch* thus lies in "the

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[33] *O'Shields* v. *McNair* (3-Judge Ct. S.C. 1966) 254 F. Supp. 708, 714.

See, also, *Keller* v. *Gilliam* (5th Cir. 1972) 454 F.2d 55, 56, where the Court emphasized that in *Fortson*, there was no attack "on the equality of the population of the different districts" and that actually they were all "*equally* populated districts * * *." (Court's italics).

[34] *Hadley* v. *Junior College District* (1970) 397 U.S. 50, 70, 90 S.Ct. 791, 25 L.Ed. 45 (Burger, C.J. dissenting).

[35] *Hadley* v. *Junior College District*, *supra*, at pp. 61 and 67 (Harlan, J., dissenting).

desirability of leaving open broad areas of experimentation in representation forms *at the local level.*" (Italics added.)[36] As it was explained in *Avery* v. *Midland County* (1968) 390 U.S. 474, 485, *Dusch* upholds in the legislature a power "of innovation, experiment, and development among *units of local government*" (Italics added) and was simply applying "constitutional principle to the complexities of local government but not to state government".[37]

Having concluded that neither legislative plan is valid, this Court, the plaintiff, McCollum, urges, should forthwith enunciate a plan of its own, based on single districts constructed to achieve population equality without regard to county boundary lines. We are, however, disposed to allow the Legislature another opportunity to develop an acceptable plan. When practical, this seems the preferable course,

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[36] *Martin, The Supreme Court and Local Reapportionment: The Third Phase* (1970) 39 Geo. Wash. L. Rev., p. 102.

One commentator, reviewing *Dusch* and *Sailors* v. *Kent Board of Education* (1967) 387 U.S. 105, has remarked:

> "The Court's reluctance to demand the rigid arithmetic equality required of state legislative and congressional districting plans seemed to reflect an awareness of the unique and varied problems facing local governmental units: 'Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation.' " quoting from *Sailors*.

O'Rourke, *Reapportionment* (Domestic Affairs Study, Washington, 1972) p. 15.

[37] *Avery* v. *Midland County, supra,* at p. 496 (Fortas, J., dissenting. See, also, *Abate* v. *Mundt, supra,* at p. 185.

since as the Court stated in *Sims* and reiterated in *Burns* v. *Richardson* (1966) 384 U.S. 73, 85, 86 S. Ct. 1286, 16 L. Ed. 2d 376, " 'legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.' "[38] The Legislature is in session; the general election itself is approximately seven months away. There is unquestionably ample time within this period for the General Assembly to formulate a new plan, based perhaps on another grouping of counties, which, while respecting county lines, will achieve an acceptable population variance, provided it will act promptly "in a timely fashion" without unnecessary delay. The General Assembly is accordingly given thirty (30) days from the date of this Order to enact a new plan. We have adopted this schedule because any greater delay might jeopardize the regular election to be held in November of this year. If the Legislature fails within that time to enact a plan, the Court will be forced to promulgate a plan of its own. The adoption of this procedure will, however, give the General Assembly every reasonable opportunity to meet its own responsibility, a responsibility that is generally to be respected, and, only by its default and failure to construct a valid plan of its own, will the Court act.

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[38] See, also, *Davis* v. *Mann, supra,* at p. 693; *Silver* v. *Jordan* (3-Judge Ct., Cal. 1964) 241 F. Supp. 576, 586, aff. 381 U.S. 415; *Moody* v. *Gallion* (D.C. Ala. 1968) 286 F. Supp. 653, 656.

We do not agree, however, that any plan that may be formulated by the General Assembly must provide for single-member districts and cannot include multi-member districts. Were this required, it is manifest neither the General Assembly nor the Court would likely be able to work out a proper plan of reapportionment for use at the election in November. We do not, however, find such drastic action required. The authorities do not interdict multi-member districts.[39] So much was held in both *Fortson* v. *Dorsey*, *supra*, and *Burns* v. *Richardson*, *supra*. It was reaffirmed and emphasized anew in *Whitcomb* v. *Chavis* (1971) 403 U.S. 124, 147, where in sustaining multi-member districts, the Court said that, "We are not ready, however, to agree that multi-member districts, wherever they exist, overpresent their voters as compared with voters in single-member districts, even if the multi-member delegation tends to bloc voting." It is only when the provision for multi-member districts incorporates some additional provision that unconstitutionally "operate(s) to minimize or cancel out the voting strength of racial or political elements * * *"[40] that it becomes illegal. Such dilution is not to be presumed; it must appear on the face of the legislation itself or from evidence in the record.[41] The Supreme

[39] In both *Kilgarlin* v. *Hill*, *supra*, and *Davis* v. *Mann*, *supra*, the apportionment plans included a combination of single and multi-member districts and this aspect of the plan was not disapproved. See, also, *Gunderson* v. *Adams* (3-judge Ct. Fla. 1970) 328 F. Supp. 584, 585, and *Wold* v. *Anderson* (3-judge Ct. Mont. 1971) 327 F. Supp. 1342, 1345.

[40] *Burns* v. *Richardson*, *supra*, at p. 88. The same rule is expressed by the Court in *Fortson* v. *Dorsey*, *supra*, at p. 439.

[41] 403 U.S. 144.

Court found no such effect in the Indiana multi-member plan reviewed in *Chavis*; indeed, as the Court remarked in *Chavis*, it has never sustained an attack on a multi-member plan.[42] If the General Assembly in this case adopts a plan with acceptable population variances and without any special provisions diluting "the voting strength of racial or political elements" the plan is not to be invalidated merely because it contains both single member and multi-member districts. The plaintiff McCollum suggests, though, that, because of a record of past racial discrimination, *Chavis*, with its approval of multi-member districts, is not applicable to a legislative reapportionment effected by a Southern Legislature. However, there is not the slightest evidence that in its reapportionments, South Carolina has ever been motived by racial considerations. In fact, we understood that counsel for McCollum conceded the want of racial motivation in the reapportionment plans reviewed in this action. Under these circumstances, there is no basis for regarding the situation in South Carolina differently from that in Indiana, which was at issue in *Chavis*. It is not to be lightly assumed that the Supreme Court intends to establish "different apportionment rules for the North and the South", and yet that is what the argument of plaintiff McCollum leads to. See, 85 Har. L. Rev. 146 (1971).

Neither do we find the provisions for a "numbered place system of conducting primary and general elections, included in both plans, illegal. Under this system, each senate seat constitutes a separate

[42] 403 U.S. 144.

and distinct office, and candidates, in qualifying, must file for one specific senate seat in any district where more than one senator is to be nominated. It is contended by the plaintiffs that this "numbered seat law" illegally dilutes minority voting power. If a plan does not incorporate the invalid residency provision, or some similar invalid restriction, it does not appear that the "numbered seat" requirement is either arbitrary or unreasonable, especially if applied fairly and indiscriminately to all senatorial seats. It was the failure to apply it uniformly throughout the State that prompted the Court in *Dunston* v. *Scott, supra,*[43] to question the validity of such a law.

As we have already indicated, the Court is confident that, observing the guidelines laid out by the applicable authorities, the General Assembly will attempt in good faith to construct a new plan, not burdened with any unacceptable restrictive provisions, that will accord with the principle of "one-man-one-vote" as stated in *Sims* and subsequent related cases. Should the General Assembly not act, however, this Court will, as we have previously indicated, proceed to reapportion the State Senate.

Judgment will accordingly be entered that Act #961 of the General Assembly of South Carolina, approved November 11, 1971, is invalid. Jurisdiction is retained to render other and further relief if the General Assembly shall fail, within thirty (30) days from the date hereof, to enact an acceptable plan for the apportionment of the Senate of the State of South Carolina.

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[43] 336 F. Supp. at p. 213.

AND IT IS SO ORDERED.

Dated: April 7, 1972.

/s/ Clement F. Haynsworth, Jr.
Chief Judge
Fourth Judicial Circuit

/s/ Donald Russell
United States Circuit Judge

/s/ J. Robert Martin, Jr.
Chief United States District Judge
District of South Carolina

APPENDIX C

Order Denying Motion To Alter or Amend Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CA/75-1998

FRANCIS MORRIS AND MAXINE WOODS,
Plaintiffs,

—versus—

L. MARION GRESSETTE, President Pro Tem of South Carolina, et al.,
Defendants.

ORDER

After due consideration of the plaintiffs' motions to Supplement Record, to Alter or Amend Judgment and for Injunction Pending Consideration of Rule 59 Motion and Pending Appeal, and of the memorandum submitted in support thereof,

IT IS ORDERED, That the motions be and they are hereby denied.

For the Court:

/s/ Donald Russell
United States Circuit Judge

[Filed Mar. 30, 1976]

APPENDIX D

Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Civil Action No. 75-1998

FRANCIS MORRIS AND MAXINE WOODS,
Plaintiffs,

—vs—

L. MARION GRESSETTE, President Pro Tem of South Carolina, et al.,
Defendants.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. § 1253, plaintiffs appeal to the Supreme Court of the United States from the judgment entered March 12, 1976, dismissing the complaint, and the order, entered March 30, 1976, denying plaintiffs' motion to alter or amend the judgment.

/s/ Armand Derfner
Armand Derfner
Epstein, McClain & Derfner
P.O. Box 608
Charleston, S.C. 29402
(803) 577-3170
Attorney for Plaintiffs

Charleston, South Carolina
April 16, 1976

APPENDIX E

Section 2 of South Carolina Act 1205 of 1972, S.C. Code § 30-4.4

SECTION 2. Effective with the 1972 elections, the State of South Carolina is hereby divided into the following Senatorial Districts:

PLAN A

		Number Senators	*1970 Population*	*Per Cent Variance From Average*
1	Abbeville Anderson Oconee Pickens	4	226,270	+0.45
2	Greenville Laurens	5	290,259	+3.08
3	Greenwood McCormick	1	57,641	+2.35
4	Spartanburg	3	173,724	+2.83
5	Cherokee Newberry Saluda Union	2	109,822	—2.49
6	York Lancaster Kershaw	3	163,271	—3.36
7	Chester Fairfield Richland	5	283,678	+0.75
8	Edgefield Aiken Barnwell Barnberg Lexington	4	228,853	+1.59

		Number Senators	*1970 Population*	*Per Cent Variance From Average*
9	Lee Chesterfield Marlboro Dillon	2	107,979	—4.13
10	Darlington	1	53,442	—5.10
11	Florence Marion Horry Williamsburg	4	224,141	—0.50
12	Sumter Clarendon	2	105,029	—6.75
13	Calhoun Orangeburg Dorchester	2	112,845	+0.19
14	Berkeley	1	56,199	—0.21
15	Allendale Hampton Jasper Beaufort Colleton	2	116,213	+3.18
16	Charleston Georgetown	5	281,150	—0.15

Each senate office shall constitute a separate and distinct office to which a separate number shall be assigned within each senatorial district. A candidate for the office of Senator within any such district shall be required to qualify for a specific senate office and shall not be permitted to qualify for more than one such office in any one election for the office of Senator.

The election ballots for the office of Senator in each district shall reflect the number assigned to each senate office and the names of the candidates for each.

In the event that Plan A does not meet the constitutional guidelines as set forth by the Three Judge Federal Court in its order of April 7, 1972, then the Senate of South Carolina shall be apportioned as follows:

PLAN B

		Number Senators	*1970 Population*	*Per Cent Variance From Average*
1	Abbeville Anderson Oconee	3	167,314	—1
1A	Pickens	1	58,959	+4.68

Provided, that if the Court determines that the division of District 1 into Districts 1 and 1A constitutes an unacceptable variance, they shall be joined and designated as District 1 with four Senators assigned thereto.

2	Greenville Laurens	5	290,259	3.08
3	Spartanburg	3	173,724	2.83
4	Greenwood McCormick	1	57,641	2.35
5	Cherokee Chester Fairfield Lancaster York	4	215,145	—4.49

		Number Senators	*1970 Population*	*Per Cent Variance From Average*
6	Newberry Union	1	58,503	3.88
7	Richland	4	233,868	3.82
8	Calhoun Lexington Saluda	2	114,320	1.50
9	Aiken Edgefield	2	106,715	—5.25
10	Allendale Bamberg Barnwell Orangeburg	2	112,607	—0.02
11	Beaufort Colleton Hampton Jasper	2	106,521	—5.42
12	Charleston Dorchester	5	279,926	—0.59
13	Lee Chesterfield	1	51,990	—7.68
13A	Marboro Dillon	1	55,989	—0.58

Provided, that if the Court determines that the division of District 13 into Districts 13 and 13A constitutes an inacceptable variance, they shall be joined and designated as District 13 with two senators assigned thereto.

14	Kershaw Sumter	2	114,152	1.35
15	Clarendon Florence	2	115,240	2.32

		Number Senators	*1970 Population*	*Per Cent Variance From Average*
16	Georgetown Horry Marion Williamsburg	3	168,005	—0.56
17	Berkeley	1	56,199	—0.21
18	Darlington	1	53,442	—5.10

Each senate office shall constitute a separate and distinct office to which a separate number shall be assigned within each senatorial district. A candidate for the office of Senator within any such district shall be required to qualify for a specific senate office and shall not be permitted to qualify for more than one such office in any one election for the office of Senator.

The election ballots for the office of Senator in each district shall reflect the number assigned to each senate office and the names of the candidates for each.*

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* A majority runoff requirement, applicable to primary elections for the state Senate and other state offices, is imposed by S.C. Code § 23-496.

APPENDIX F

Section 5 of the Voting Rights Act of 1965, as Amended, 42 U.S.C. § 1973c

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on

account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Supreme Court, U. S.
FILED
NOV 12 1976
MICHAEL RODAK, JR., CLERK

No. 75-1583

In the Supreme Court of the United States

OCTOBER TERM, 1976

FRANCES MORRIS, ET AL., APPELLANTS

v.

L. MARION GRESSETTE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,

J. STANLEY POTTINGER,
Assistant Attorney General,

BRIAN K. LANDSBERG,
JOHN C. HOYLE,
JESSICA DUNSAY SILVER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1583

FRANCES MORRIS, ET AL., APPELLANTS

v.

L. MARION GRESSETTE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's order of June 21, 1976, inviting the Solicitor General to submit a brief expressing the views of the United States. The United States suggests that the Court note probable jurisdiction.

QUESTION PRESENTED

The United States will discuss the following question:

Whether the Attorney General's objection to South Carolina's reapportionment of its Senate in Act 1205,

interposed after the Attorney General's earlier determination not to object had been invalidated on judicial review, prevents Act 1205 from becoming effective under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

STATEMENT

Under Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. 1973c, no change in the voting laws or practices of covered jurisdictions that alters such laws or practices in effect on November 1, 1964, may be enforced unless and until the change is declared, in a suit brought by the covered jurisdiction against the United States before a three-judge district court in the District of Columbia, to be without discriminatory purpose or effect. Such a proceeding becomes unnecessary, however, if the change has been submitted to the Attorney General, and "[h]e has not interposed an objection within sixty days after such submission * * *" or has sooner indicated that he does not object. *Ibid.*

The State of South Carolina is a covered jurisdiction. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 318. This case involves legislation (Act 1205) reapportioning the South Carolina Senate.

A. The Reapportionment Litigation

The events leading to the Attorney General's objection to Act 1205 began five years ago. On November 11, 1971, South Carolina enacted alternative reapportionment plans for the State Senate (Act

932). *Harper* v. *Levi*, 520 F. 2d 52, 57 (C.A.D.C.). Both plans provided for multi-member districts, required candidates to run for numbered posts, and required primary elections to be decided by a majority vote. *Id.* at 57-58. Private suits contending that Act 932 violated the Voting Rights Act and the Fourteenth and Fifteenth Amendments were filed and a three-judge court was convened to hear them. (*Twiggs* v. *West*, D.S.C. Civ. No. 71-1106, decided April 7, 1972). *Id.* at 58. While these actions were pending, South Carolina submitted Act 932 to the Attorney General for Section 5 clearance. *Ibid.* On March 6, 1972, the Attorney General objected to Act 932 because he was "unable to conclude * * * that the combination of multi-member districts, numbered posts, and a majority (run-off) requirement would not occasion an abridgement of minority voting rights in South Carolina." *Ibid.*

Approximately one month later, the three-judge court rejected the Fifteenth Amendment claim for lack of evidence that the reapportionment was racially motivated (J.S. App. 47a), declined to consider the Voting Rights Act challenge to Act 932 (J.S. App. 30a), but held that the Act violated the Fourteenth Amendment due to malapportionment. *Twiggs* v. *West*, *supra* (J.S. App. 26a-49a). The court then allowed South Carolina 30 days within which to enact an acceptable substitute reapportionment plan. *Harper* v. *Levi*, *supra*, 520 F. 2d at 58.

On May 6, 1972, the South Carolina General Assembly passed the legislation involved in this case—

Act 1205 (J.S. App. 52a-56a). Section 2 reapportioned the State's senatorial districts. It set forth two alternative apportionments, Plan A and Plan B, and provided that if Plan A did not "meet the constitutional guidelines as set forth by the Three Judge Federal Court in its order of April 7, 1972, then the Senate * * * shall be apportioned" under Plan B (J.S. App. 54a). This Act retained the provisions of Act 932 calling for multi-member districts, numbered posts, and a majority vote in primaries. *Id.* at 57-58. Section 3 of the Act also included a provision extending the numbered post requirement to existing multi-member districts in the State House. *Id.* at 58.

South Carolina's chief legal officer submitted Act 1205 to the Attorney General on May 12, 1972. Eleven days later, on May 23, 1972, the three-judge court held the Senate reapportionment constitutional (Mot. to Aff. 15a), and ordered Plan A into effect (*ibid.*). The court stated that it had considered a number of other plans and found no other plan to be a substantial improvement over Plan A.[1]

While the Attorney General was considering Act 1205, South Carolina, on May 30, 1972, submitted to the Attorney General additional legislation (Act 1204) which extended the numbered post requirement to "all multi-member elective districts" in South Carolina. *Harper* v. *Levi*, *supra*, 520 F. 2d at 58.

[1] In an order dated June 9, 1972, denying plaintiff's motion to vacate or amend its May 23 order, the court stated that it had acted to grant relief because the General Assembly had failed to adopt a plan.

On June 19, 1972, the Attorney General notified South Carolina that he had received the previously requested information concerning Act 1204, that the submission on Act 1204 was complete, and that the 60-day period for Section 5 review of that statute would begin on that date. 520 F. 2d 59.

On June 30, 1972, the Attorney General interposed an objection to Act 1204 and to the part of Act 1205 that required numbered posts for the State House. *Ibid.* He declined, however, to object to Section 2 of Act 1205, reapportioning the State Senate, because he felt "constrained to defer to the * * * determination of the three-judge District Court" in *Twiggs*. The Attorney General wrote: "It would in our view not be appropriate to read the Voting Rights Act as requiring or permitting the Attorney General to review a determination made by a United States District Court in the proper exercise of its statutory jurisdiction" (Mot. to Aff. 15a).

B. The Suit to Compel the Attorney General to Exercise His Discretion

On August 10, 1972, two black South Carolina citizens sued the Attorney General in the District Court for the District of Columbia claiming that he had failed to exercise his discretion in not objecting to the Senate reappointment in Act 1205, *Harper* v. *Levi*, *supra*, 520 F. 2d at 59. The next day, the single judge district court entered an order finding that the time within which the Attorney General could object to Act 1205 had not expired and extending the time within which he could interpose an ob-

jection until further order of the court, or a further decision of the Attorney General (Mot. to Aff. 19a-20a). On May 16, 1973, the single judge district court granted summary judgment for plaintiffs and ordered the Attorney General to make "a reasoned decision in accordance with his statutory responsibility." *Harper* v. *Kleindienst*, 362 F. Supp. 742 (D.D.C.), affirmed, 520 F. 2d 53 (C.A.D.C.). In response to the order, the Attorney General filed a memorandum stating that in his opinion the Senate reapportionment had a "clear and substantial racial effect in contravention of the Fifteenth Amendment and its protections under Section 5 of the Voting Rights Act," but, nevertheless, he felt constrained to defer to the *Twiggs* decision and he declined to enter an objection. *Harper* v. *Levi*, *supra*, 520 F. 2d at 59.

The district court, on July 19, 1973, issued a second order directing the Attorney General to "[consider] Act 1205 without regard to the decision of the [*Twiggs*] Three Judge District Court." *Ibid.* Thereafter, on July 20, 1973, the Attorney General interposed an objection *nunc pro tunc* to the Senate reapportionment because he was "unable to conclude that Act No. 1205 does not have the effect of abridging voting rights on account of race" (Mot. to Aff. 18a).

On appeal from the single-judge court's orders in *Harper*, a divided panel of the District of Columbia Circuit affirmed,[2] holding (520 F. 2d at 59-60) (footnotes omitted)—

[2] Judge MacKinnon, dissenting, reasoned that Section 5's provision permitting a submitted change to be enforced with-

> that the court had jurisdiction [under 5 U.S.C. 702] of appellees' action, that the Attorney General's decision not to object was reviewable under the circumstances of this case, and that Section 5 requires him to make an independent determination on the merits of the Section 5 issues.

C. The Three Judge Court Decision in This Case

After that decision became final, two other South Carolina voters filed the present suit, as a class action under Section 5, in the district court in South Carolina (Mot. to Aff. 3a). Plaintiffs sought to enjoin implementation of the Senate reapportionment plan contained in Act 1205 on the ground that it had not been cleared under Section 5 by the Attorney General, or by a declaratory judgment action in the District Court for the District of Columbia. A three-judge court convened under Section 5[3] unanimously dismissed the complaint (J.S. App. 1a-25a). It held that the doctrine of collateral estoppel did not preclude the court from considering South Carolina's contention that, notwithstanding *Harper* v. *Levi*, *supra*, the requirements of Section 5 were satisfied when the Attorney General failed to interpose an objection within sixty days after submission to him of the Senate reapportionment plan contained in Act

in sixty days if the Attorney General failed to object committed the matter of objection solely to agency discretion. It was therefore unreviewable. *Id.* at 73-74.

[3] Two of the judges, Haynsworth, Chief Cir. J., and Russell, Cir. J., had participated in *Twiggs* v. *West*, *supra*.

1205 (J.S. App. 5a). Second, it ruled that the original determination by the Attorney General under Section 5 to defer to the district court in *Twiggs* v. *West* and to decline to render an independent judgment was not judicially reviewable (J.S. App. 25a). Finally, it held that the failure of the Attorney General to interpose an objection within sixty days of the submission authorized the State of South Carolina to implement the Senate reapportionment plan contained in Act 1205 (J.S. App. 25a). Accordingly, the court denied the injunction and dismissed the complaint.

THE QUESTION IS SUBSTANTIAL

This case presents a direct conflict between the three-judge district court in South Carolina and the District of Columbia Circuit as to the availability of relief to compel the Attorney General to exercise independent review of changes in voting laws and practices subject to Section 5 of the Voting Rights Act.[4]

[4] The policy of deference reflected in the Attorney General's determination of June 30, 1972, in this case was based on the belief that a local district court seized of a reapportionment suit challenging voting law changes adopted after November 1, 1964, "unquestionably had jurisdiction to consider the issues presented to it under both the Fourteenth and Fifteenth Amendments" (Mot. to Aff. 15a). In 1975, however, this Court held, in such a suit, that new reapportionment legislation is not effective in a covered jurisdiction until clearance under Section 5 has been obtained from the District of Columbia court or the Attorney General. Therefore a local district court errs in considering the constitutionality of such legislation under the Fifteenth Amendment. *Connor* v. *Waller*, 421 U.S. 656. Under the rationale of *Waller*, the district court in *Twiggs* should not have considered the Fifteenth Amendment

The court below has concluded that the district court in the *Harper* litigation was without jurisdiction, and therefore could not invalidate the Attorney General's prior non-objection so that he could reconsider the matter *nunc pro tunc*. In consequence, according to the court below, the Attorney General's objection of July 20, 1973, was a nullity, and Act 1205 may be enforced unless and until invalidated in an independent suit under the Fourteenth or Fifteenth Amendment. While the Attorney General, in light of this Court's subsequent decision in *Connor* v. *Waller*, 421 U.S. 656, has determined that the policy of deferring to local district courts with respect to matters subject to Section 5 is erroneous and no longer pursues that policy, he is of course substantially concerned with enforcement of the Fifteenth Amendment,[5] and with whether and to what extent his determinations under Section 5 may be reviewed.[6]

issues, nor should the Attorney General have deferred to its decision. However, the question remains whether the *Harper* court had jurisdiction, on judicial review, to nullify his erroneous determination, so that he could reconsider the submission of May 12, 1972, *nunc pro tunc*. The government's appeal in *Harper* antedated this Court's decision in *Connor* v. *Waller*, *supra*, and *Dunlop* v. *Bachowski*, 421 U.S. 560 discussed *infra*, p. 15, which clarified the applicable law.

[5] The government has previously participated in various stages of this litigation. The United States participated as an *amicus curiae* in *Twiggs* v. *West*; the Attorney General was the defendant in *Harper*, and the United States submitted an *amicus curiae* brief supporting the plaintiffs in the court below.

[6] Although the parties proceeded in the court below on the theory that Section 5 applies to Act 1205, appellees, in a

1. The court below held that the Attorney General's action was not "adjudicatory," *i.e.*, it had no binding effect on anyone's legal rights (J.S. App. 14a-15a). Moreover, it reasoned, any party dissatisfied with the Attorney General's failure to object had an adequate remedy in court, because Section 5 expressly

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post-judgment motion, filed after this Court's decision in *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636, argued that under the rule of that case Act 1205 might be a court-ordered plan outside the scope of Section 5. If Section 5 does not apply, there would be no reason to reach the question of the validity of the Attorney General's objection in this case because preclearance would not have been required.

The *Twiggs* court, in approving Act 1205, indicated that it had considered a number of other plans and found none to be a substantial improvement over Plan A. In an order dated June 9, 1972, the court stated that it had acted to grant relief because the General Assembly had failed to adopt a plan. See p. 4, n. 1, *supra*. Despite these indications that Act 1205 was adopted by the court as relief, we believe that the plan is not a court-ordered plan, within the meaning of *East Carroll*. Contrary to the situation in *East Carroll*, the South Carolina legislature "reapportioned itself on its own authority." *East Carroll*, *supra*, 424 U.S. at 638-639, n. 6. The ~~direct~~ district court did not direct the preparation of a plan, but, rather, gave the legislature 30 days to enact one. Although its enactment was in the alternative, and subject to court approval, in our view it is an enactment undertaken upon the initiative of the legislature and could "not be effective as [law] until and unless cleared pursuant to § 5." *Connor* v. *Waller*, 421 U.S. 656. The court's subsequent adoption of the plan does not change its nature and origin. *Ibid.*

We do, however, recognize that the distinction between court-ordered plans under *East Carroll* and non-court-ordered plans subject to Section 5 is not always clear. If this Court were to determine that Act 1205 is a court-ordered plan, the presumption against the use of multi-member districts would, of course, apply. *East Carroll*, *supra*, 424 U.S. at 639.

provides that "neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement [of the change in election procedures]" (J.S. App. 15a). Thus, in the court's view, no private voter can be "adversely affected" or suffer any injury in fact entitling him to seek judicial review under the Administrative Procedure Act, 5 U.S.C. 702. The court further concluded that the express language of Section 5, as well as its legislative history, demonstrated that determinations by the Attorney General under Section 5 are not reviewable. To allow such review, it said, would, through delay, defeat the purpose of that sixty day limit within which the Attorney General must object before a submitted change in voting procedures may become effective and would require the Attorney General to make explicit reviewable findings, in the absence of a statutory requirement that he do so (J.S. App. 20a-23a). The court also stated that such review would be inappropriate because it would be available to private parties, in the form of a suit before a single judge district court under 5 U.S.C. 702, but would not be equally available to the states covered by Section 5, since the states' sole remedy is by a declaratory judgment action in a three judge district court of the District of Columbia (J.S. App. 24a-25a).

2. The district court's analysis misapprehends both the limited nature under the Administrative Procedure Act, 5 U.S.C. 701-706, of a judicial remedy to compel the exercise of administrative discretion, and

the purpose and effect of Section 5 of the Voting Rights Act. In our view the district court should have enforced the objection which had been entered by the Attorney General *nunc pro tunc* after he independently exercised his discretion under the *Harper* court's decree.

The district court's conclusion that when the Attorney General defers to a court ruling instead of exercising independent discretion no rights are determined is incorrect. Section 5 created a new statutory interest, supplementary to, but separate from the rights enforceable in a Fifteenth Amendment suit. It was Congress' answer to "nearly a century of systematic resistance to the Fifteenth Amendment * * *". *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328. Congress therein directed the automatic suspension of all new election requirements in covered jurisdictions, including reapportionment (*Georgia* v. *United States*, 411 U.S. 526), subject to alternative procedures for administrative or judicial determinations that "continued suspension of the new rule is unnecessary to vindicate rights guaranteed by the Fifteenth Amendment." *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 335.

This suspension and clearance procedure has five legally significant effects upon the rights of voters in covered jurisdictions. First, it frees them from the requirement of complying with changed election laws or procedures until the changes are shown to have no racially discriminatory purpose or effect. Second, it interposes the federal government between the voter protected by the Fifteenth Amendment and the

covered jurisdiction. Third, it imposes on the jurisdiction, not the citizen, the burden of initiating clearance proceedings. Fourth, it transfers the venue of such proceedings to the District of Columbia. Fifth, it places the burden of proving the absence of discriminatory purpose or effect upon the covered jurisdiction.[7]

Congress adopted this "unusual and * * * severe procedure" (*Allen* v. *State Board of Elections*, 393 U.S. 544, 556) because it found that "existing remedies were inadequate" (*ibid.*) to assure vindication of Fifteenth Amendment rights in the face of persistent efforts in some States to defeat them. See *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 309. By these new statutory procedures, Congress intended "to make the guarantees of the Fifteenth Amendment finally a reality for all citizens." (*Allen*, *supra*, 393 U.S. at 556). The Attorney General's role in passing upon Section 5 submissions is essential to the achievement of this purpose. Thus, his determination to defer to a district court has a substantial effect on the rights of voters protected by that Section.

The immediate consequence of the Attorney General's failure to object is to lift the automatic suspension and eliminate the need for clearance. Thereafter all citizens of a covered jurisdiction must ad-

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[7] While the statute did not specify that in submissions to the Attorney General the burden of proof is on the jurisdiction, the Attorney General adopted this standard in regulations approved by this Court in *Georgia* v. *United States*, 411 U.S. 526, 531-539.

here to the new voting requirements. If those requirements perpetuate racial discrimination, the sole remedy for vindication of Fifteenth Amendment rights is a private suit in which the citizen must carry the burden of proving racially discriminatory purpose or effect. This is, however, the very remedy that Congress found to be inadequate, and that it sought to supplement by the suspension and preclearance provisions of Section 5. That Section's five effects (*supra*, p. 12) provide the requisite support for private actions to enjoin the implementation of voting changes by covered jurisdictions in the absence of the required clearance under Section 5. *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 556-557. Since these privately enforceable statutory rights may be lost forever when the Attorney General fails to object, it is incorrect to reason, as did the district court, that no legal rights are determined when the Attorney General announces his determination to defer, rather than to exercise his judgment on the merits.[8]

On the contrary, such a refusal entails substantial legal consequences, since it removes the barrier to enforcement of the state law imposed by Section 5.

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[8] For these reasons, the district court's reliance on *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, is misplaced. The Court there held unreviewable an agency's determination of probable cause to refer a drug company's case to the Attorney General for the institution of seizure proceedings because its only consequence was to subject the company to possible suit. As we have shown above, the determination here has immediate effects on the voting rights of citizens.

It has the practical effect of eliminating the protections of Section 5 and of authorizing a change in the state's voting laws. Accordingly, we now believe, in light of decisions of this Court rendered subsequent to our appeal in *Harper* (see n. 4, *supra*), that judicial relief to compel the Attorney General to exercise his discretion, to the limited extent exercised in *Harper*, is authorized by law. 28 U.S.C. 1361 (district courts have jurisdiction of suit to compel performance of official duty); 5 U.S.C. 706(1) (reviewing court may compel agency action unlawfully withheld).

In holding that such limited judicial relief (obtained here in *Harper*) is a nullity to be disregarded, the decision below is inconsistent with *Dunlop* v. *Bachowski*, 421 U.S. 560. This Court there held that the Administrative Procedure Act authorizes judicial review, for limited purposes, of a decision of the Secretary of Labor not to bring a civil action to set aside a union election under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 73 Stat. 520, 29 U.S.C. 402(b). The court below purported to distinguish *Bachowski* on the ground that suit by the Secretary was the exclusive remedy for irregularities in a union election, and plaintiffs there thus had no adequate remedy at law. The same is true, we submit, with respect to Section 5, since a determination by the Attorney General to defer to the district court ruling and not to decide independently whether to object under Section 5 leaves a state's voters without the protections of that statute.

His non-objection based on such a determination affects the statutory rights of the state's electorate under the Voting Rights Act at least as much as the Secretary's decision not to challenge a union election affects the rights of the union electorate under the LMRDA.

Indeed, the holding below that a voter suit under the Fifteenth Amendment is an adequate remedy at law not only is contrary to the congressional finding that such relief is inadequate (see, *supra*, p. 13), it also misconstrues the language of 5 U.S.C. 704, which defines the kinds of administrative actions subject to judicial review. That section expressly provides for judicial review of "final *agency* action for which there is no other adequate remedy in a court * * *" (emphasis added). A private suit challenging a state voting law under the Fifteenth Amendment does not involve review of "agency" (the Attorney General's) action under Section 5.

Although the language and history of Section 5 demonstrate that the Attorney General's determination is to be made swiftly (*Georgia* v. *United States*, *supra*, 411 U.S. at 539) and independently (*Perkins* v. *Matthews*, 400 U.S. 379, 385), they do not support the district court's conclusion that Congress foreclosed the kind of limited judicial relief exercised in *Harper*. The language of Section 5 must be read in light of the presumption of reviewability contained in the Administrative Procedure Act. *Dunlop* v. *Bachowski*, *supra*, 421 U.S. at 567; *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140. Considering this presumption, we believe that an area of judicial review, no broader than that exercised in *Harper*, is in accord with the legislative scheme of the Voting Rights Act, as well as 5 U.S.C. 706(1) and 28 U.S.C. 1361.

The legislative history of the 1965 Act is not to the contrary. The provision for clearance by the Attorney General within a fixed period was suggested by then Attorney General Katzenbach in response to concerns that plainly lawful state legislation would be unduly delayed pending a declaratory judgment action in the District Court for the District of Columbia. The Attorney General suggested that the declaratory judgment action could be limited "to those laws which the Attorney General takes exception to within a given period of time." Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., Pt. 1, 237 (1965). He did not suggest that judicial review was to be totally foreclosed, nor did anyone else.

The sixty-day limit contained in Section 5 is not evidence that Congress intended to foreclose limited judicial review. The sixty-day limit assures expeditious clearance by the Attorney General of changes in state law which obviously raise no problems under the Fifteenth Amendment. By establishing this convenience for covered jurisdictions, Congress did not intend to preclude judicial review to determine whether the decision of the Attorney General to defer to a district court's Fifteenth Amendment ruling rather than to exercise his discretion was in accord with the requirements of the Voting Rights Act. Con-

gress could safely presume that such relief was available under the Administrative Procedure Act (see discussion, *supra*). "Any less stringent standard might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance." *Georgia* v. *United States*, *supra*, 411 U.S. at 538. Thus the sixty-day limit is not conclusive of the rights of the citizens protected by Section 5. The right to an independent exercise of discretion by the Attorney General before the protections of Section 5 are lifted is enforceable by the judiciary in proceedings for judicial review, for the same reasons that the rights of a union electorate are enforceable by a limited (although somewhat broader) review of the Secretary of Labor's decision not to challenge a union election.

Nor is there any unfairness in affording this limited judicial review to voters even though covered jurisdictions cannot obtain review of the Attorney General's determination and are instead confined to the declaratory judgment proceeding in the District of Columbia. Perfect symmetry in judicial review proceedings is not required, so long as the substantial rights of all parties may be asserted in a judicial forum. See e.g., *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576 (rail carrier may obtain review of administrative reparations order only in defense of enforcement action by shipper). The *de novo* suit provided for in the District of Columbia is a full and complete remedy for cov-

ered jurisdictions.[9] *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 332.[10]

The court below emphasized the congressional purpose to allow the Attorney General freely to exercise his discretion regarding compliance with the substantive requirements of Section 5. (J.S. App. 22a-23a). However, the *Harper* ruling supports that purpose, by requiring the Attorney General to exercise his discretion. We believe that a proper reading of the limited judicial review undertaken by the *Harper* court—review in the nature of mandamus of the Attorney General's failure to exercise his discretion on the basis of a stated policy [11] found by the *Harper*

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[9] Although not an indispensable party (*Harper* v. *Kleindienst*, *supra*, 362 F. Supp. at 744), a covered jurisdiction, of course, may intervene in any suit challenging the Attorney General's failure to object and defend its interest. Appellees did not do so here.

[10] Appellants also contend (J.S. 14-15) that this Court need not determine whether the decision in *Harper* is correct because the single-judge district court in that case issued an interlocutory order declaring that the Attorney General's time to object had not expired, and would be extended until he acted or until further order of the court. See Statement, *supra*, pp. 5-6. Under *United States* v. *United Mine Workers*, 330 U.S. 258, the argument continues, this order was intended to preserve the status quo pending the court's determination of its jurisdiction, and therefore was clearly within the inherent powers of the district court. This aspect of *Mine Workers*, however, involved the power of the district court to impose contempt sanctions upon a party for disobeying an order directed to it. In this case South Carolina was not a party to the *Harper* litigation and was not under a court order restraining enforcement of Act 1205. *Mine Workers* therefore has no application here.

[11] See *supra*, p. 8, footnote 4.

court to be contrary to the procedural requirements of the Voting Rights Act—will not interfere with the substantive determinations committed by Section 5 to the discretion of the Attorney General.

In sum, we submit that, in light of *Connor* v. *Waller*, *supra*, and *Dunlop* v. *Bachowski*, *supra*, the decision in *Harper* v. *Levi* was correct, and that the district court erred in refusing to defer to it. In the alternative, if the Court considers Act 1205 to embody a court-ordered plan within the meaning of *East Carroll Parish* v. *Marshall*, 424 U.S. 636, then the district court abused its discretion by authorizing multi-member districts. See n. 6, p. 10, *supra*.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

BRIAN K. LANDSBERG,
JOHN C. HOYLE,
JESSICA DUNSAY SILVER,
Attorneys.

NOVEMBER 1976.

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APPENDIX

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DOCKETED APRIL 28, 1976
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* Note that the following documents are reprinted in the Jurisdictional Statement: the Opinion Below (filed March 12, 1976) at J.S. App. 1a; the Order Denying Motion To Alter or Amend Judgment (filed March 30, 1976) at J.S. App. 50a; and the Notice of Appeal (filed April 16, 1976) at J.S. App. 51a.

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 7, 1975 —Plaintiff Morris' complaint filed in United States District Court for the District of South Carolina, Charleston Division.

Nov. 19, 1975 —Designation of three-judge court.

Nov. 28, 1975 —Defendants' answer filed.

Dec. 4, 1975 —Pre-Trial Conference

Jan. 26, 1976 —Plaintiffs' brief filed.

Jan. 26, 1976 —Defendants' brief filed.

Jan. 26, 1976 —Stipulations of facts filed.

Jan. 28, 1976 —Amicus memorandum of the United States filed.

Jan. 28, 1976 —Oral arguments held.

Jan. 29, 1976 —Letter from Mr. Derfner to Judges Haynsworth, Russell and Hemphill.

Jan. 29, 1976 —Defendants' post-hearing memorandum of law.

March 12, 1976—Order of three-judge court dismissing plaintiffs' complaint.

March 22, 1976—Plaintiffs' motion to alter or amend judgment.

March 22, 1976—Plaintiffs' motion to supplement record.

March 22, 1976—Plaintiffs' motion for injunction pending consideration of rule 59 motion and pending appeal.

March 30, 1976—Order denying plaintiffs' motions to supplement record, to alter or amend judgment and for injunction pending consideration of rule 59 motion and pending appeal.

April 16, 1976 —Plaintiffs' notice of appeal filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Civil Action No. 75-1998

FRANCES MORRIS AND MAXINE WOODS,
Plaintiffs,

—vs—

L. MARION GRESSETTE, President Pro Tem of the South Carolina Senate; JAMES B. EDWARDS, Governor of South Carolina; DANIEL R. MCLEOD, Attorney General of South Carolina; BRANTLEY HARVEY, JR., Lieutenant Governor of South Carolina; LOVICK O. THOMAS, Clerk of the South Carolina Senate; O. FRANK THORNTON, Secretary of State of South Carolina; JAMES ELLISOR, Executive Director of the South Carolina State Election Commission; G. P. CALLISON, Chairman, South Carolina State Election Commission; MARGARET TOWNSEND, MARTHA CHAPMAN, EDGAR L. MORRIS, and RUBEN GRAY, Members, South Carolina State Election Commission,

Defendants.

PLAINTIFFS' COMPLAINT

Filed Nov. 7, 1975

1. This is a complaint pursuant to section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, for declaratory and injunctive relief against the enforcement of Act 1205, Acts of the South Carolina General Assembly of 1972.

2. Jurisdiction arises under 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1973c. The matter in controversy,

exclusive of interest and costs, exceeds the value of $10,000.00.

3. Plaintiffs Frances Morris and Maxine Woods are citizens of the United States and residents and qualified electors of Charleston County, South Carolina. Each is Black.

4. Each plaintiff sues in her own behalf, and, pursuant to Rule 23(b)(2), Fed. R. Civ. P., on behalf of all others similarly situated. The class includes all qualified electors of South Carolina, particularly all Black qualified electors. The class is so numerous that joinder of all members is impracticable. The questions of law and fact are common to the class. Plaintiffs' claims are typical of the claims of the class, and plaintiffs will fairly and adequately represent the interests of the class. Defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

5. Defendant Gressette is a member of the South Carolina Senate and is President Pro Tem of that legislative body; Defendant Edwards is the Governor of the State of South Carolina and in his capacity as Governor of the State of South Carolina is charged with the execution and enforcement of the Constitution and Laws of the State of South Carolina, including all laws pertaining to elections; Defendant Harvey is the Lieutenant Governor of the State of South Carolina and President of the South Carolina Senate and, as such, is the presiding officer of that legislative body; Defendant Thomas is the Clerk of the South Carolina Senate and is charged with the preparation of calendars, journals and other records of the Senate which list matters of pending business and reflect action taken on all legislative items before that body; Defendants Callison, Townsend, Chapman, Morris and Gray are members of and constitute

the South Carolina State Election Commission and, as such, are charged with general administration of elections for State Senate and other state offices; Defendant Ellisor is Executive Director of the South Carolina Election Commission and as such is responsible for the actual administration of the responsibilities vested in the South Carolina Election Commission; Defendant McLeod is Attorney General of the State of South Carolina and chief law officer of the State of South Carolina, and is responsible under 42 U.S.C. § 1973c for seeking and obtaining authority to enforce voting changes (such as Act 1205) which are covered by that section; Defendant Thornton is Secretary of State of South Carolina, is custodian of the Acts of the General Assembly and is also responsible for preparing, signing, recording and issuing commissions of office including those for the office of State Senate.

6. Defendant Gressette is sued in his own behalf and, pursuant to Rule 23(b)(2), Fed. R. Civ. P., on behalf of the class of all members of the South Carolina Senate. The class is so numerous that joinder of all members is impracticable. The questions of law and fact are common to the members of the class. Defendants' claims are typical of the claims of the class, and defendants will fairly and adequately represent the interests of the class. Plaintiffs have acted on grounds generally applicable to the defendant class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

7. Each defendant and member of the defendant class is sued in his individual and official capacities.

8. Each defendant and member of the defendant class has, at all times relevant herein, acted and threatened to act under color of law.

9. The State of South Carolina is a covered jurisdiction pursuant to 42 U.S.C. §§ 1973b and 1973c. 30 Fed. Reg. 9897 (August 7, 1965).

10. On May 6, 1972, the State of South Carolina adopted Act 1205, Acts of the General Assembly of 1972, reapportioning the South Carolina Senate.

11. Act 1205 constitutes a "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964."

12. The State of South Carolina has not gained authority to enforce Act 1205 in the manner required by 42 U.S.C. § 1973c. *Harper* v. *Levi*, 520 F. 2d 53 (D.C. Cir. 1975).

13. South Carolina's failure to gain authority pursuant to 42 U.S.C. § 1973c for enforcement of Act 1205 renders that act ineffective as law and unenforceable.

14. Notwithstanding the unenforceability of Act 1205, the defendants intend to enforce that Act at statewide elections to be held in 1976, and to conduct elections for, and authorize the seating of, members of the South Carolina Senate according to the provisions of Act 1205.

15. On information and belief, members of the defendant class have decided and announced that they will enforce Act 1205 and will not comply with 42 U.S.C. § 1973c unless ordered by this Court.

16. The enforcement of Act 1205 will violate the rights of plaintiffs and members of their class as guaranteed by the Voting Rights Act, 42 U.S.C. § 1973 *et seq.*

17. Plaintiffs have no adequate remedy at law for this violation of their rights. Unless this Court enjoins enforcement of Act 1205, plaintiffs will suffer irreparable injury to their precious right to vote.

WHEREFORE, plaintiffs pray that this Court grant the following relief:

a. Order that a three-judge court be convened, pursuant to 42 U.S.C. § 1973c.

b. Certify the plaintiff and defendant classes pursuant to Rule 23(b) (2), Fed. R. Civ. P.

c. Grant a permanent injunction against the enforcement of Act 1205.

d. Enjoin the conduct of any elections or preparation for elections for the South Carolina Senate pursuant to Act 1205 or any other reapportionment plan which has not been lawfully cleared pursuant to 42 U.S.C. § 1973c.

e. Declare that this Court will itself devise an interim plan for the conduct of the 1976 elections and for the seating of Senators for terms of such length as may be deemed equitable, if (1) by January 31, 1976, the appropriate defendants have not submitted a new reapportionment plan for clearance pursuant to 42 U.S.C. § 1973c, or if (2) by March 31, 1976, clearance pursuant to 42 U.S.C. § 1973c has not been obtained for a new reapportionment plan.

f. Award the plaintiffs their costs of suit and reasonable attorneys' fees.

g. Grant such other and further relief as may be appropriate.

EPSTEIN, MCCLAIN & DERFNER
P.O. Box 608
Charleston, S.C. 29402
(803) 577-3170
Attorneys for Plaintiffs

By: /s/ ARMAND DERFNER

PAUL R. DIMOND
Lawyers Committee for Civil Rights Under Law
520 Woodward Building
Washington, D.C. 20005

TRUE COPY
TEST:

MILLER C. FOSTER, JR.
Clerk

/s/ CHARLOTTE LIENLOPHER
By: Deputy Clerk

Charleston, S.C.
November 6, 1975

[Certificate of Service Omitted in Printing]

DEFENDANTS' ANSWER

Filed Nov. 28, 1975

[Caption Omitted in Printing]

Come now the Defendants in the above-styled action and in answer to the Complaint herein do say and allege:

IN ANSWER TO THE COMPLAINT AND AS A FIRST DEFENSE

1. Defendants admit the allegations of Paragraph 1 of the Complaint insofar as those allegations merely state the purpose of Plaintiffs in instituting this action.

2. Defendants admit only so much of Paragraph 2 of the Complaint as alleges that jurisdiction arises under 28 U.S.C. § 1343 and 42 U.S.C. § 1973c. Defendants deny the remaining allegations of Paragraph 2. Defendants further allege that this action is proper for determination by a three judge court as required by 28 U.S.C. § 2281 and 42 U.S.C. § 1973c and that declaratory judgment is appropriate under 28 U.S.C. § 2201.

3. Defendants, being without sufficient knowledge or information as to the allegations of Paragraph 3 of the Complaint, deny the same.

4. Defendants deny the allegations of Paragraph 4 of the Complaint.

5. Defendants admit the allegations of Paragraph 5 of the Complaint except that statement alleging the defendant Morris to be a member of the South Carolina State Election Commission as the defendant Morris is no longer a member of the Commission and has been replaced by Raymond A. Harris.

6. Defendants admit the allegations of Paragraph 6 of the Complaint.

7. Defendants admit only so much of Paragraph 7 of the Complaint as alleges that each defendant and member of the defendant class is sued in his official capacity.

8. Defendants admit only so much of Paragraph 8 of the Complaint as alleges that each defendant and member of the defendant class has, at all time relevant herein, acted under color of state law. Defendants deny the remaining allegations of Paragraph 8.

9. Defendants admit the allegations of Paragraphs 9, 10 and 11 of the Complaint.

10. Defendants deny the allegations of Paragraphs 12 and 13 of the Complaint. Defendants further alleged in answer to Paragraphs 12 and 13 of the Complaint that by letter of June 30, 1972, from David L. Norman, Assistant Attorney General, Civil Rights Division, to Honorable Daniel R. McLeod, Attorney General, State of South Carolina, the United States Attorney General stated: ". . . we enter no objection to the implementation of Plan A of Act 1205." This decision to enter no objection to Plan A of Act 1205 was lawful, valid, and within the scope of the authority vested in the United States Attorney General by 42 U.S.C. § 1973c and constitutes authority under which the State of South Carolina and the Defendants may enforce Plan A of Act 1205 of 1972.

11. Defendants admit only so much of Paragraph 14 of the Complaint as alleges that the defendants intend to enforce Act 1205 of 1972 at statewide elections to be held in 1976 and to conduct elections for, and authorize the seating of, members of the South Carolina Senate according to the provision of Act 1205. Defendants deny the remaining allegations of Paragraph 14.

12. Defendants deny the allegations of Paragraphs 15, 16 and 17 of the Complaint.

13. All allegations of the Complaint not hereinabove expressly admitted are hereby denied.

AS A SECOND DEFENSE

14. Defendants reallege and incorporate in this defense, as if fully set out herein, the allegations of Paragraphs 1 through 13 above.

15. By letter of May 9, 1972, from Hardwick Stuart, Jr., Assistant Attorney General, to Assistant Attorney General, Civil Rights Division, the Defendant McLeod, as chief legal officer of the State of South Carolina submitted Act 1205 of 1972 to the United States Attorney General pursuant to 42 U.S.C. § 1973c.

16. On May 17, 1972, the United States Attorney General gave official notice that the submission of Act 1205 of 1972 had been received on May 12, 1972, and that the Attorney General had 60 days from May 12, 1972, in which to respond to the submission.

17. July 11, 1972, was the sixtieth calendar day after May 12, 1972.

18. The United States Attorney General did not, on or before July 11, 1972, interpose an objection to the enforcement of Section 2 of the Act 1205 of 1972.

19. Pursuant to 42 U.S.C. § 1973c, Section 2 of the Act 1205 of 1972 may be enforced by the State of South Carolina and the Defendants, because Act 1205 has been submitted to the United States Attorney General and he has not interposed an objection to Section 2 of Act 1205 within 60 days after such submission.

AS A THIRD DEFENSE

20. Defendants reallege and incorporate in this defense, as if fully set out herein, the allegations of Paragraphs 1 through 19 above.

21. In the case of *McCollum, et al.* v. *West, etc., et al.*, Civil Action No. 71-1211, Plan A of Act 1205 of 1972 was considered and approved by a three-judge panel of this Court, acting within its lawful jurisdiction, on May 23, 1972, the Court finding specifically that Plan A "complies with the requirements of the Constitution of the United States, and it is therefore approved." The *McCollum* plaintiffs claimed that multimember districts and numbered seats for the election of the South Carolina Senate had the effect of denying or abridging the right of qualified black citizens to vote on account of their race, a claim that was decided adversely to the *McCollum* plaintiffs by this Court.

22. 42 U.S.C. § 1973c neither requires nor permits the United States Attorney General to review a determination made by a United States District Court in the proper exercise of its statutory jurisdiction that a legislative reapportionment plan does not deny or abridge the right of qualified black citizens to vote on account of their race.

23. Pursuant to the determination of this Court in *McCollum* v. *West* that Plan A of Act 1205 complies with the requirements of the Constitution of the United States, the State of South Carolina and the Defendants may enforce Plan A of Act 1205.

WHEREFORE, having fully answered the Complaint herein, the Defendants, and each of them, pray the Court:

(1) To enter judgment declaring that the Defendants may lawfully continue to enforce Plan A of Act 1205 of 1972 and denying the Plaintiffs the relief sought in the Complaint; and

(2) To award the Defendants the costs of this action and reasonable attorneys' fees.

DANIEL R. MCLEOD
Attorney General

TREVA G. ASHWORTH
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

RANDALL T. BELL
University of South Carolina
Law Center
Columbia, South Carolina 29208

BY: /s/ DANIEL R. MCLEOD
Attorneys for the Defendants

Columbia, South Carolina
November 28, 1975.

[Certificate of Service Omitted in Printing]

EXCERPTS FROM PRE-TRIAL CONFERENCE

Held December 4, 1975

[Caption Omitted in Printing]

[1] A formal conference was called in the above entitled case on the 4th day of December, 1975, in the United States District Court, Columbia, South Carolina.

BEFORE: HON. J. ROBERT MARTIN, JR., Presiding, Chief United States District Judge, For the State of South Carolina.

Appearances:

ARMAND DERFNER, Esq., appearing in behalf of the Plaintiff.

RANDALL T. BELL, Esq., appearing in behalf of the defendants.

E. Jackie Cole,
Official Court Reporter

[2] THE COURT: I see it now, okay. All right, Gentlemen, that clears us down to what I would rather do first in talking with the two members of the Court, is that you give me your ideas from the standpoint of the relevant issues. By that is meant this, this matter has previously been before this same Court, as it is presently constituted in a previous action, when was it? Two years ago?

MR. BELL: Yes, it has been there, your Honor.

THE COURT: What the first thing that—we have conferred over the telephone—that entered all of our minds is this, what if anything legally or factually has changed in this matter as it presently is other than it was from a record standpoint as it was before us previously.

MR. DERFNER: Your Honor, if you want me to respond. . .

[3] THE COURT: I don't want any detail. What I'm wanting to do is to explore it from the standpoint of our determining what record we want, if it is necessity of further record.

MR. DERFNER: Our impression, we may be able to do even better than the Court may have expected. I know my impressions, and I think in general Mr. Bell and I are in accord, that we not only don't need much record, if any, but we don't need the old record. In other words, the issues in this case are principally legal, having to do with whether the objection letter of the Justice Department counters or doesn't counter is basically what it boils down to. For one thing, none of the underlying questions of single versus multi district...

THE COURT: That's exactly what we driving at.

MR. DERFNER: We don't think any of that is really in the case directly at this point. In fact, I think we both think at least as to the issues of liability, that is whether the Senate does or does not have to be reapportioned, we can pretty much move for cross motion of summary judgment. There are a couple of depositions scheduled...

THE COURT: I notice that in the file.

MR. DERFNER: They, and some other conferences between us will probably nail down the few facts. I think we'll essentially have on the question of liability what amounts to almost a stipulated set of facts.

[4] MR. BELL: I think we're in accord with that, your Honor. I think it is agreed that neither set of parties has any interest in delaying this litigation. We want to move forward with it as quickly as possible. I would like to say a couple of things. First of all, we agree with Mr. Derfner that the question here is not multi-member districts versus single-member districts. In fact, the issues which were litigated on the merits before the Court three years ago simply are not present in this case. Certainly the defendants would take the

position that there has been no change in either the law [5] or the facts.

THE COURT: Well, that was primarily...

MR. BELL: We feel the plan is just as enforcible now as it was three years ago when he had it up. I would say that on the question of relief, I think that it is not going to be a simple matter. It will be very complex matter, but...

THE COURT: Well, that's a bridge we would have to cross.

DEFENDANTS' EXHIBIT NO. 1

Complaint in *Harper* v. *Kleindienst*, C.A. No. 1607-72 (D.D.C.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1607-72

JOHN ROY HARPER, II
1125½ Washington Street
Columbia, S.C. 29202

and

VICTORIA DELEE
Route 2
Box 142
Ridgeville, S.C. 29472,

Plaintiffs,

—vs—

RICHARD KLEINDIENST,
Attorney General of the
United States
United States Department
of Justice
Washington, D.C. 20530

DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division
United States Department
of Justice
Washington, D.C. 20530,

Defendants.

COMPLAINT

1. This is an action for review of a decision by defendants unlawfully refusing to object to certain changes

in the election procedures of the State of South Carolina, which were submitted to the defendants under the provisions of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. That statute obligates the defendants to object to a submitted voting change unless there is proof that the change does not have a racially discriminatory purpose or effect. Plaintiffs seek (1) a declaratory judgment that defendants' refusal to object was unlawful and (2) injunctive relief compelling them properly to perform their duty under Section 5. The defendants' violation of their statutory duty in this case abridged plaintiffs' right to be free from racial discrimination or dilution in voting.

2. The particular change in South Carolina's law submitted to the defendants provides for the substitution of multi-member State Senate districts for certain districts which had been single member, with the provision for numbered seats within the multi-member districts, and the requirement of a majority vote to win election.

PARTIES

3. Each of the individual plaintiffs is a citizen of the United States and a resident and registered voter of the State of South Carolina. Each is black. Their names and counties of residence are as follows: John Roy Harper, II (Richland County); and Victoria DeLee (Dorchester County). Each of these counties is within a multi-member Senate district under Act 1205.

4. Each plaintiff sues in his own behalf, and, pursuant to Rule 23(b)(2), Fed. Rules Civ. Proc., on behalf of all those similarly situated, including particularly all black residents of the counties included in multi-member districts. The class is so numerous that joinder of all members is impracticable. The questions of law and fact are common to the members of the class. Plain-

tiffs' claims are typical of the claims of the class, and plaintiffs will fairly and adequately represent the interests of the class. Defendants have acted and refused to act on grounds generally applicable to the class, thereby making final relief appropriate with respect to the class as a whole.

5. Defendant Richard Kleindienst is the Attorney General of the United States of America, under Section 5 of the Voting Rights Act, is the official designated to receive and act on voting changes submitted under that Section. Defendant David L. Norman is an Assistant Attorney General of the United States of America, in charge of the Civil Rights Division of the United States Department of Justice and is the person to whom defendant Kleindienst has delegated general responsibility for administering Section 5, including the functions of deciding whether or not to object to submitted changes, and of signing letters announcing objections and non-objections under Section 5. Each defendant is sued in his official capacity.

JURISDICTION

6. The actions of the defendants hereinafter alleged constitute final agency action within the meaning of Section 10 of the Administrative Procedure Act and constitute a failure of the Attorney General of the United States to perform a duty owed to the plaintiffs and the class they represent. Plaintiffs have exhausted all administrative remedies. This Court has jurisdiction of this action under 5 U.S.C. §§ 701-706, and 28 U.S.C. §§ 1331, 1361 and 2201.

OPERATION OF SECTION 5 OF THE VOTING RIGHTS ACT

7. The State of South Carolina is covered under Section 5 of the Voting Rights Act. 30 Fed. Reg. 9897 (Aug. 7, 1965).

8. A state or political subdivision covered by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, may not lawfully enforce a "voting prerequisite or qualification, or standard, practice or procedure different from that in force or effect on November 1, 1964" [hereinafter referred to as a "voting change"] unless it either obtains a declaratory judgment from the United States District Court for the District of Columbia that the submitted law "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or unless the voting change "has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission."

9. The Attorney General's regulations concerning his decision whether or not to object to a voting change read, in pertinent part, as follows:

> "Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U.S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has

a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable to the District Court, enter an objection and so notify the submitting authority." 28 C.F.R. § 51.19.

SOUTH CAROLINA'S VOTING CHANGE— ACT NO. 932

10. On November 9, 1971, the Governor of South Carolina signed into law Act No. 932, referred to as the "Reapportionment Act of 1971" which created alternate plans for the reapportionment of the Senate of South Carolina. Act 932 provided for the establishment, for the first time in South Carolina, of many multi-member Senate districts, and provided for a "numbered post" system (*i.e.*, the designation of each office as a separate numbered office).

11. On November 11, 1971 the Attorney General of South Carolina, pursuant to a resolution of the General Assembly, brought a declaratory judgment action to test the constitutionality of the reapportionment schemes of Act 932 under the Fourteenth Amendment.

12. On December 7, 1971, plaintiff Harper and others brought an action attacking Act 932 on the grounds, *inter alia*, that it violated the Fourteenth and Fifteenth Amendments and Section 5 of the Voting Rights Act [hereinafter referred to as Section 5], 42 U.S.C. § 1973c.

13. During the pendency of the above lawsuits, the State of South Carolina submitted Act 932 to the Attorney General for his review, pursuant to Section 5 of the Voting Rights Act. The Attorney General performed his statutory duty, and by letter of March 6, 1972, interposed his objection to the enforcement of Act 932. (A copy of the Attorney General's letter of March 6, 1972 is annexed hereto as Exhibit No. 1.) In so doing he stated:

> "Our analysis of recent federal court decisions dealing with issues of this nature, and to which we feel obligated to give great weight, leaves us unable to conclude, with respect to these plans, that the combination of multi-member districts, numbered posts, and a majority (run-off) requirement would not occasion an abridgement of minority voting rights in South Carolina."

14. On April 7, 1972, after a trial of the claims in the above lawsuits, the South Carolina three judge District Court issued its opinion which invalidated Act 932 as unconstitutional under the Fourteenth Amendment, but sustained the statute against the Fifteenth Amendment challenge. The Court noted its lack of jurisdiction to decide the issues raised by plaintiffs' cause of action under the Voting Rights Act, and expressly declined to rule thereon. The Court ordered South Carolina to enact equitable reapportionment legislation and to submit its new enactment for the Court's review. *Twiggs* v. *West*, Civ. No. 71-1106 (D.C.S.C., April 7, 1972). A copy of that opinion is annexed hereto as Exhibit No. 2.

SOUTH CAROLINA'S VOTING CHANGE— ACT NO. 1205

15. On May 6, 1972 the Governor of South Carolina signed into law Act No. 1205 which created alternate plans for the reapportionment of the State Senate. The apportionment scheme of Act 1205 differs from that proposed by Act 932 in creating a more even distribution of voting population among districts, but retains the characteristics found objectionable by the Attorney Gen-

eral in his March 6, 1972 determination: In particular, Plan A of Act 1205 creates even more multi-member districts than the earlier Act and establishes a "numbered post" system for these districts. A copy of Act 1205 is annexed hereto as Exhibit No. 3.

16. South Carolina submitted Act 1205 to the South Carolina District Court which, without further proceedings, issued an order finding Plan A of Act 1205 to be constitutional. *Twiggs* v. *West*, Civ. No. 71-1106 (D.C. S.C., May 23, 1972).

17. The Plaintiffs and those persons for whom this action is brought constitute a cognizable racial minority large enough and, in most cases, concentrated enough to be able to elect or participate in the elections of candidates of their choice provided the districts are fairly drawn. The creation of multi-member senatorial districts, however, with senators elected at large, operates to dilute and cancel out the voting strength of plaintiffs and their class. The above-mentioned diluting effect is aggravated by ancillary provisions of Act 1205 such as the use of the "numbered post" system which further tends to impair the ability of plaintiffs and members of their class to cast effective ballots.

SUBMISSION OF ACT 1205 TO THE ATTORNEY GENERAL

18. The changes alleged in paragraph 15 are voting changes which cannot be enforced without Section 5 clearance.

19. The State of South Carolina initially submitted Act 1205 to the Attorney General on May 12, 1972, and requested expedited consideration of its submission. Defendant Norman requested additional materials and information from the State, and by letter dated June 19, 1972 notified South Carolina that its submission was

complete. Pursuant to that letter and the defendants' regulations, 28 C.F.R. § 51.18(a), the sixty-day period under Section 5 commenced on June 19, 1972 and will terminate on August 17, 1972.

20. On June 30, 1972 defendant Norman issued a letter objecting to Section 3 of Act 1205 which Section established numbered seating in the State House of Representatives, but refusing to interpose an objection to Plan A of Act 1205 relating to the State Senate. Defendant Norman stated as the basis for such refusal that he was "constrained to defer to the . . . determination of the three-judge District Court", although no determination had been made by said Court of rights under the Voting Rights Act. A copy of that letter is annexed hereto as Exhibit No. 5.

21. Defendant Norman failed to make the determinations required under Section 5 of the Voting Rights Act and under the Attorney General's regulations as to whether Plan A of Act 1205 has the purpose or effect of denying or abridging the right to vote on account of race or color.

22. The defendants' failure to make the determinations described in paragraph 21 and the purported reliance of defendant Norman on a nondispositive determination of a district court in South Carolina described in paragraph 20 violated defendants' obligation under the Voting Rights Act, 42 U.S.C. § 1973c, the regulations, 28 C.F.R. § 51.19 and the principles established by their prior rulings.

INJURY

23. The plaintiffs and all members of their class will suffer irreparable and continuing injury if this Court does not grant relief. Upcoming primary elections, final elections in November, 1972 and future elections thereafter will be held for the State Senate, in accordance

with the provisions of Act 1205, which elections will abridge and deny plaintiffs' right to vote on account of race. Unless this Court grants relief, plaintiffs and all members of their class will have no opportunity to obtain administrative review of Act 1205 under the Voting Rights Act which places the burden of proof upon a state seeking approval of a change in its voting procedures.

RELIEF

24. WHEREFORE, plaintiffs pray that the Court:

(1) advance this cause on the docket;

(2) declare that the action of defendant Norman of June 30, 1972 described in paragraph 20, which action was taken pursuant to delegation of authority from defendant Kleindienst, is unlawful and void;

(3) direct the defendants to reach an independent determination pursuant to Section 5 and to report such determination to the Court for such further proceedings as the Court may require; and to require defendants to notify the State of South Carolina that they object to Plan A of Act 1205 and to maintain such an objection in force until further order of the Court; and

(4) award plaintiffs such other relief as the Court may deem equitable.

August 10, 1972

J. ROGER WOLLENBERG
MAX O. TRUITT, JR.
TIMOTHY N. BLACK
GILBERT C. BERKELEY, JR.
Wilmer, Cutler & Pickering
900 17th Street, N.W.
Washington, D.C. 20006
Tel. No. 296-8800
Attorneys for Plaintiffs

Of Couusel:

MATTHEW J. PERRY
Jenkins, Perry & Pride
924 Hampton Street
Columbia, South Carolina 29202

FRED HENDERSON MOORE
39 Spring Street
Charleston, South Carolina 29403

GEORGE PAYTON
65 Spring Street
Charleston, South Carolina 29403

BERNARD R. FIELDING
93-B Spring Street
Charleston, South Carolina 29403

ARMAND DERFNER
Lawyers' Committee for Civil
Rights Under Law
Suite 520
733 Fifteenth Street, N.W.
Washington, D.C. 20005

[Exhibit to Complaint Omitted]

DEFENDANTS' EXHIBIT NO. 11

Letter of March 6, 1972 from David L. Norman to Daniel R. McLeod

Department of Justice
Washington, D.C. 20530

Honorable Daniel R. McLeod
Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Dear Mr. Attorney General:

This is in reference to the redistricting plans for South Carolina State Senate Districts (Act No. 932) submitted by your office pursuant to Section 5 of the Voting Rights Act of 1965 and received by this Department on November 22, 1971. Supporting information necessary to make the submission complete was received by this Department on January 5, 1972. Thus, under departmental guidelines, the Attorney General's response is due on March 6, 1972.

We have given careful consideration to the submitted districting plans (Plan A and Plan B) and the supporting information, as well as to information received from other sources. Insofar as time limitations have allowed, we have studied both plans in detail. As a result, however, we are unable to conclude, as we must under the Voting Rights Act, that either proposed Plan A or Plan B will not have the effect of abridging the right of black citizens of South Carolina to vote on account of race or color.

A careful analysis and review of the demographic facts involved and recent court decisions identify several significant areas of concern. Twelve of the 23 proposed districts under Plan A and 14 of the 20 districts in Plan B

are multi-member. We note that in these districts candidates must run for numbered posts. It is our understanding also that South Carolina law requires a majority of votes to win primary elections. A substantial number of the multi-member districts in each plan have significant concentrations of black population.

Our analysis of recent federal court decisions dealing with issues of this nature, and to which we feel obligated to give great weight, leaves us unable to conclude, with respect to these plans, that the combination of multi-member districts, numbered posts, and a majority (run-off) requirement would not occasion an abridgement of minority voting rights in South Carolina. The reasoning of these recent cases is illustrated by the decision of the federal district court in North Carolina which commented with respect to numbered posts in multi-member districts, "It is clear that the numbered seat law may have the effect of curtailing minority voting power." (*Scott* v. *Dunston*, N.D.N.C. No. 2666-Civil, Slip Opinion, n. 9 at p. 17, (Jan. 10, 1972)). Similarly, the three-judge court considering the Texas legislative reapportionment found both the majority run-off and the numerical post requirement tended to abridge minority voting power and "highlight the racial element where it does exist." *Graves* v. *Barnes*, W.D. Tex., No. A-17-CA-142, Slip Op. at p. 38. See, also, *Sims, Farr, and U.S.A.* v. *Amos*, No. 1744-N, (M.D. Ala., January 3, 1972); *Bussie* v. *The Governor of Louisiana*, No. 71-202 E.D. La., August 24, 1971). And the Supreme Court, while not holding multi-member districts unconstitutional, *per se*, has recognized the potentially discriminatory effect such districts can have by submerging a cognizable racial minority into a majority white district. See *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971).

For the foregoing reasons, I must on behalf of the Attorney General interpose an objection to changes sub-

mitted by these reapportionment plans. We have reached this conclusion reluctantly because we fully understand the complexities facing any state in designing a reapportionment plan to satisfy the needs of the state and its citizens, and, simultaneously, to comply with the mandates of the Federal Constitution and laws. We are persuaded, however, that the Voting Rights Act compels this result. However, nothing contained herein should be construed in any way as addressing the Fourteenth Amendment issues involved, which I understand are pending before the Court.

Of course, Section 5 permits seeking approval of all changes affecting voting by the United States District Court for the District of Columbia irrespective of whether the changes have previously been submitted to the Attorney General.

Inasmuch as the United States District Court for the District of South Carolina has deferred proceedings in pending cases involving this reapportionment plan until the Attorney General completed his review, I am taking the liberty of furnishing a copy of this letter to the Court.

Sincerely,

/s/ David L. Norman
DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division

EXCERPTS FROM DEPOSITIONS

Deposition of Gerald W. Jones

DIRECT EXAMINATION

* * * *

BY MR. BELL:

[4] Q And how long have you held that position?
A Since that section was created in 1969.
Q Mr. Jones, what is your present position of employment, please?
A My position is Chief of the Voting Section, Civil Rights Division, Department of Justice, United States Department of Justice.

* * * *

[10] Q Did you participate in the hearings that were conducted by the Oversight Committee of the House Judiciary Committee in 1971 concerning the enforcement of the Voting Rights Act; specifically, Section 5?
A Well, I was there.
Q You were present during the hearings?
A That's right.
Q And you have no recollection that a question was raised as to the burden of proof under Section 5 submissions?
A Oh, I am sure that a question was raised.
Q And you have no recollection that the Department of Justice indicated that initially its position was that the department would have to look at the evidence accompanying a submission and would only object if it found evidence that the change which was being submitted in fact had a discriminatory effect?
[11] A I can't honestly say that that is my present recollection.
Q And you have no recollection of the department taking that position as far as particular submissions that

were made under Section 5 prior to the promulgation of the 1971 procedures?

A Well, the one that readily comes to mind is the Mississippi open primary submission. That was the position taken by the department with respect to that submission.

Q By "position," you mean that the department would have to find the change—

A The position was that the department couldn't conclude that the change was discriminatory, therefore we would not object.

• • • •

[13] A Well, I am not sure that there was any standard that you could articulate that was being used during that period of the enforcement of Section 5.

The standard that was applied in the Mississippi open primary case would seem to be obvious from the reasoning in the decision itself. I would not be able to say that any particular given standard was used at that time. As a matter of fact, that was one of the reasons for—that led up to the creation of the administrative procedure, so that there would be articulated consistent procedures that would govern the administration of the Section 5 evaluation process.

Q Are you saying there were no standards used at the time, that the department itself had no standards that it applied consistently and uniformly?

A None that I was aware of, except to the extent of making a judgment as to whether or not the change had the potential of racial discrimination.

• • • •

[16] Q Prior to the effective date of the present Section 5 submission procedures, was there any particular type of data the department required submitting authorities to send along with submissions.

A As far as I can recall, it was strictly an ad hoc thing, that whoever was reviewing a particular submis-

sion used his own judgment as to what information he would need and sought to get it.

No, no rules at all that I am aware of.

• • • •

[21] Q Would there be cases involving routine matters such as changing from paper ballots to voting machines, and things of this sort, in which you would not solicit comments from these types of parties?

A No. Those kinds of changes we very much seek comments on, because those are of particularly local application, and the input of the affected electorate is most significant to us on those kinds of changes.

Q So it would have been a general policy to solicit these comments—

A That's right.

Q —regardless of the type of submission?

A Exactly.

Q But you stated that you can't say for certain that it was done in the case of every submission?

A Well, that's right.

• • • •

[24] Q Now, in saying that there are no documents other than that one document, do you mean to say that in no other case except that one case did the Attorney General defer to a finding of the Federal Court and enter non-objection?

A On the basis of that deferral.

Q On the basis of that deferral.

A That's correct.

Q And that is the only case that—

A That's right.

Q —in which that ever occurred?

A That's correct. To my knowledge, that is; and of course I wasn't associated with the program in the early —mid-'60's. I mean thereafter, after the Voting Rights Act.

Q But since October of '69,—
A That's right.

* * * *

[35] We—and when I say we, I mean the Department of Justice—in the administration of Section 5, is essence acting as surrogate of the court here in the District of Columbia. That court has ruled—

Q My question—my question, Mr. Jones, my question is, on what date—I am simply asking for a date; and at what date did the department consider that period to have begun to run?

A What I am trying to say is that we indicated our position on that question before the court. The court—

* * * *

[36] Q I am not asking you, Mr. Jones, either to agree or disagree with the courts.

A We—

Q And I understand what you are saying. But I am simply asking you as a factual matter when did that period begin to run as far as your department was concerned in 1972?

MR. DERFNER: Yes, but I object to that; because when you say "as a factual matter," that is a deceptively simple phrase. It is not a factual matter entirely; it is a factual and legal matter.

You can ask obviously what position did the department take in litigation when the issue arose; but I don't think you can—the court has concluded it and I don't think it is proper to go beyond that, to go beyond those statements that are on the record as far as litigation which is—

* * * *

[37] Q Do you understand my question, Mr. Jones?

A Yes; I do.

Q Could you answer it, please?

A At the time of litigation of Harper back in '72, the Department of Justice represented to the court what our position was. As a matter of fact, we represented to the court that in our view, the 60-day period had expired by the time the litigation was initiated.

* * * *

[38] Q Now, with respect to Act 1205, was the date which the department determined the 60-day period had begun to run May 12 of 1972?

A As I indicated before, we took the position in the District Court in this litigation in the Harper litigation that the the submission of Act 1205 was complete on the date we initially received it.

Q And with respect to Act 1204; that is, the statewide numbered seats for local offices, did the department consider the 60-day period to that submission to begin on a different date than May 12, 1972?

A According to Exhibit 8, which is a copy of the notice on the receipt of Act 1204, that Act was received on May 30, which is a date different from the date that we received the [39] Act 1205.

Q So the period for that Act, as far as the department was concerned, began to run on May 30th?

A No; it did not.

Q And why did it not begin to run on May 30th? Was that because you needed additional information before that submission was considered complete?

A That is correct.

Q And this would be additional information that is requested in the letter marked as Defendant's Exhibit No. 6?

A Defendant's Exhibit No. 6 is a copy of our letter requesting additional information with respect to Act 1204.

Q And that is the same additional information which is acknowledged as having been received in Defendant's Exhibit No. 7, the letter of June 19th?

A That is correct.

Q So only when you had received that additional information respecting Act 1204 did you consider the 60-day period to begin to run for that submission?

A That is normal procedure; yes.

Q And that procedure would be stated in the regulation?

A That is correct.

Q Mr. Jones, let's look one minute at Defendant's Exhibit No. 9, which is a letter of June 30th to the Attorney General of South Carolina from the Assistant Attorney General [40] for the Civil Rights Division.

A Um-hmm.

Q Is that letter, Defendant's Exhibit No. 9, a response to the submission of Act 1205 and a response to the submission of Act 1204; that is, is it a response to both of those submissions?

A Yes; it is.

Q Is it unusual or uncommon for the Attorney General to respond to more than one submission in the same letter?

A It is not routinely done; no.

Q But it is done?

A On occasion; yes.

* * * *

Where you have different submissions, is it not the case that you will respond to those submissions, even though they are different submissions, in one letter?

[41] A We have done that; yes.

Q And this is not an unusual procedure?

A Well, it is unusual in the sense that it is not done very often.

* * * *

[42] Q Act 1204 and 1205 were not submitted under cover of one letter; is that correct?

A That's correct.

[43] Q In that case, that would be considered as two separate submissions?

A That's correct; yes.

Q And the response to those two separate submissions is contained in one letter; namely, the letter of June 30, 1972?

A That's correct.

* * * *

[44] Q To your knowledge, did the Voting Rights section receive other supporting data which is not reflected in the summaries contained in these two exhibits with respect to submission of Act 932 of 1971 and Act 1205 of 1972?

A I don't personally recall. And this list was prepared from what is contained in our files now.

Q Your correspondence?

A That's correct.

Q Do you recall if Mr. Robert Rush was the attorney principally in charge of the submission in the South Carolina reapportionment plan at that time?

A He was in charge of our evaluation of it; yes.

Q So he would have been the person normally who would have requested any additional information and would have been the person who would have seen that rather than yourself?

A That's correct.

For a bit of clarification, he would not have requested the additional information. That form goes out from the Assitant Attorney General's office. But he would have initiated the request.

Q Is it sometimes the practice of attorneys within the Voting Rights section simply to make informal telephone calls and request information that way?

[45] A That's correct.

Q Is is possible that Mr. Rush might have done that?
A That is possible.

* * * *

And I would like to ask this question again just for clarification.

To your knowledge is the only case in which the Attorney General has entered a non-objection to a change submitted under the Voting Rights Act on the basis of referral to a Federal court, which would be the case of Act 1205, the South Carolina Senate reapportinment?

A That's correct.

* * * *

[48] Q I would refer you to Paragraph No. 10, which is on Page 3. This is some information which your staff is still compiling, which I would like, in the interest of avoiding having to come back and ask you this question at some later time, to ask you at this point if any of the information referred to in Paragraph 10 was placed in evidence in the case of Harper against Levi?

A No; not that I recall; no.

* * * *

CROSS EXAMINATION

* * * *

BY MR. DERFNER:

[50] Q And to your knowledge, did the department receive very many submissions before 1969?

A No, not many at all compared to what we have received since.

Q And is it fair to say that the submissions started coming in after the Allen case and then were really—started coming in in big volume after the Parkins case of '71?

A The big increase we noticed in 1971.

Q And it was in '71, as you said, that you formulated the—or promulgated the regulations governing your procedures?

A That's correct.

* * * *

[51] Has it been the policy or practice of the voting section or the personnel of the voting section handling specific submissions, to engage in frequent telephone conversations concerning those submissions?

A Telephone conversations outside the department?
Q Yes.
A Yes.

Q And those conversations would be sometimes with representatives of the submitting jurisdictions, such as the lawyer for the county or city or state or whatever, or official of that—

A That's correct.
Q —of that submitting jurisdiction.

And those conversations would be to gain further information or further insights on the information that was already—

A Clarification or something of that sort; yes.
Q Okay.

And that also sometimes included obtaining additional information by phone?

A That's correct.

MR. BELL: If I might interrupt at this point, are we talking now about after 1969, October '69, or before?

MR. DERFNER: Well, I am talking about after '69,

* * * *

[52] Q And have there also been telephone conversations of that sort with other people residing in or knowing about the situation in the submitting jurisdiction, to gain further information?

A Yes.

Q And this is when you referred to talking to community leaders or people familiar with the situation or in that area?

A That's correct.

* * * *

[53] Q Apart from this response, or from this particular decision involving South Carolina and these numbered seats, is it unusual for the department to deal with matters that are considered separate submissions in the same letter and in the same discussion?

MR. BELL: I am not sure what is meant by "discussion."

MR. DERFNER: Okay.

THE WITNESS: I am afraid I am not clear on what you are asking me, either.

MR. DERFNER: Okay.

BY MR. DERFNER:

Q When you have separate submissions—I think you said that you ordinarily dealt with them in separate letters—this technique of using—used in this letter, of dealing with the 1204 and 1205 together and, in fact, dealing with Section 3 of 1205 and Act 1204 in the same set of paragraphs—

A Oh; I understand.

* * * *

[54] A Well, it is unusual in the sense that I don't recall during my experience with Section 5 ever having run into a situation like this before where we had two simultaneous submissions involving the same issues, and the issue raised by the numbered post provision in Section 3 were essentially the same as the issue raised by Section—I mean Act 1204. So the reasoning supported both decisions.

* * * *

RE-DIRECT EXAMINATION

* * * *

BY MR. BELL:

[56] Q Mr. Jones, I have here a document, actually a paperback pamphlet, entitled "Extension of the Voting Rights Act, Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee of the Judiciary, House of Representatives, 94th Congress, First Session, on H. R. 939, H. R. 2143, [57] H. R. 3247, and H. R. 3501, Extension of the Voting Rights Act." This is Serial No. 1, Part 2. I would like to turn to Appendix 3, which is entitled Federal Review of Voting Changes: How to Use Section 5 of the Voting Rights Act, by David H. Hunter, Joint Center for Political Studies, Voter Education Project, Lawyers Committee for Civil Rights Under Law." And specifically, at Page 1523 of the hearing record, which is Page 51 of this Appendix 3, there is a paragraph entitled: The Sixty-Day period; and I am now handing you this House hearings.

Would you kindly read that into the record for me, read it aloud, that one paragraph?

A "The Sixty-Day Period.

"If the Attorney General decides to object he must do so within 60 days of receiving the submission. Until the 60 days have passed, the new practice or procedure cannot be implemented by the submitting jurisdiction. If the 60 days pass and the Attorney General has taken no action or has not objected, the change can be put into effect.

"Under the department's regulations, the 60 days do not begin until it has received a complete submission; that is, until the department has received all the information it considers necessary to making a determination of whether the change is discriminatory or not.

"Furthermore, the 60 days begins when the Attorney [58] General sees the submission, not when it is mailed by the submitting jurisdiction.

"The 60-day requirement is met if the department mails out its objection on the 60th day, even if it is received several days later.

"Finally, if the 60th day falls on a weekend or a holiday, the department has until the next working day to make its objection."

Q Now, if you would like to keep that in front of you, I would like to ask you a question or two about that.

First of all, do you understand what is being said there? If not, I will give you a moment to just review that and let it sink in.

A I think I understand.

Q Could you tell me whether that is an accurate statement of the policy as administered by—the policy and practice of the Voting Rights section concerning the 60-day period?

MR. DERFNER: I will wait until you finish. I want to make an objection to the question.

BY MR. BELL:

Q In your opinion, Mr. Jones, is that an accurate statement of the policy or practice followed by the Voting Rights section concerning Section 5 submissions?

MR. DERFNER: Okay. I object to the relevance. It calls for a legal conclusion; it is not clear whether the—[59] well, an objection as to the form—that it is not clear to me from the question whether Mr. Jones was asked for his view on whether this is an accurate reflection of the law in general or the law as it applies to a particular case such as this case or any other case.

BY MR. BELL:

Q Mr. Jones, my question, noting Mr. Derfner's objection, my question is whether that statement in your opinion is an accurate statement, statement of the policy in fact that is followed by the Voting Rights section, concerning Section 5 submissions. I am not asking you

to draw legal conclusions. I am just asking you if that is a correct statement of your practice and policy in administering Section 5.

A That is a correct statement of the general practice of the voting section in administering section 5 and is, as outlined in the Administrative Procedures for the administration of Section 5.

* * * *

RE-CROSS EXAMINATION

* * * *

BY MR. DERFNER:

[63] Q And is it true—and would you read, in Exhibit—the attachment to Exhibit 10; that is, the filing of the department's memorandum of July 16, 1973, Page 6.

Would you read the second full paragraph?

A Yes.

Q The second full paragraph, beginning with, "In view".

A You want me to read it aloud, or—

Q Just read the whole paragraph.

A Aloud?

Q Yes.

A Oh.

"In view of these facts, we were and still are compelled to conclude that Act No. 1205 has a clear and substantial racial effect in contravention of the 15th Amendment and its protections under Section 5 of the Voting Rights Act. Indeed, the reasons for finding a contravention of the 15th Amendment in the first set of Senate plans submitted (Act No. [64] 932) as we did in our objection letter of March 6, 1972, are also present upon reviewing the existing Act in question (Act No. 1205)."

* * * *

DIRECT EXAMINATION

* * * *

BY MR. BELL:

[6] Q Were you familiar with the practices, procedures and policies of the Civil Rights Division in connection with Section 5 enforcement during that period?

A I am sure I was at the time. I don't know that I could reconstruct them in any detail at this time.

Q Let me ask you some specific questions and see if you can recall.

Do you recall whether it was the practice in Section 5 enforcement at that time to object to a submission on the basis that the submitting jurisdiction had not carried its burden of proof in showing that the change being submitted would not have a discriminatory effect on minority voters? In other words, was the standard followed at that time in the department to place the burden of proof on the submitting jurisdiction with respect to the facts of a change?

A Well, I don't have a specific recollection that we had a guideline of that type in dealing with burden of proof. I do know that the whole thrust of the Voting Rights Act was to shift the burden of proof from private individuals to the states which sought changes.

* * * *

[7] Q Would it be incorrect to say that the—in Section 5 enforcement, the Civil Rights Division interposed objections only if it found affirmative evidence that the change would have a discriminatory effect?

MR. DERFNER: During what period?

MR. BELL: This is during the period '65 to '67. Still with respect to the jurisdictions that Mr. Turner had responsibility for, Mississippi and Louisiana.

MR. DERFNER: I think I am going to object to that, too, on the lack of foundation; because I am not sure

that it has been established that there were any objections during that period to submissions from those two states.

BY MR. BELL:

Q Do you recall if there were any objections to submissions from those two states during the period '65 to '67, Mr. Turner?

A No; I don't recall. I am sure the record would reflect it, and had I known you wanted that kind of information, I would have been prepared to have it for you.

Q In fact, for the record, we did request information which would have shown us that, and it was not available by the date of this deposition today. That information would be supplied. But that information was requested—not from you, Mr. Turner, but from Mr. Jones.

A Whatever the record shows.

[8] Q Do you recall whether there were any great number of objections to changes in voting procedures in those two jurisdictions during the period '65 to '67?

A My recollection is that there were not.

Q And do you have an explanation for why there were few objections during that period?

A Almost all of our resources at that time were concerned with enforcing other portions of the Voting Rights Act. 1966 was the first elections in which the Voting Rights Act was applied to the southern states; we had major elections that year in Alabama; in 1967 we had major elections in Mississippi; we had elections in 1966 in Louisiana; virtually all of the time and resources the Division had across the board were consumed in designating counties for examiners, servicing those examiners, setting up forms for examiners and observers to use, instructing observers, selecting places where observers were to go. It was pretty much a year-round project.

During that period, Section 5 just did not get any significant attention.

Q And when you refer to "the Division," you are speaking of the Civil Rights Division?

A Yes.

* * * *

[13] THE WITNESS: Well, let me say that, without talking about specific drafts, that we did change the approach from one which was essentially where we set out to find out whether or not there was discrimination, to one where the state was imposed, or the submitting authority was required to present that and to prove the essence [absence] of discrimination.

There was contention made on both sides; and in the regulatory—regulation-making process, we considered all manner of views, and finally concluded that the guidelines in final form adequately and accurately represented the Congressional will, and properly interpreted the law.

Q So there was a shift which was reflected in the guidelines as actually covered? Is that what you are saying?

A That is right. We had considered other alternatives, [14] rejected them in favor of this one, which we thought was the right guideline to have.

* * * *

[15] Q Would it be accurate to say that prior to the subject date of the new procedures that came out of this process you described, that objection was interposed only in [16] those cases where the Department had reached the conclusion that the effect of the change would in some way be to abridge or deny the voting rights of minorities?

A I think that is generally accurate.

Q And would it be accurate to say that under the procedures as they now exist and have existed since September '71 that the Attorney General may and in fact has interposed objections where the submitting authority

has not demonstrated the absence of a discriminatory effect?

A Well, whatever the guidelines say. I am not sure they are in that precise language.

Q But is—

A I think we have followed the guidelines and the sense that they were issued.

Q I am not sure that the guidelines speak directly to that question. So let me ask it again.

Is it accurate to say that the Attorney General has interposed objections to changes in cases where, in the judgment of the Attorney General, the submitting authority had now shown that the change would not have a discriminatory effect?

A Well, I am sure that has happened. The nearest that I can come to a categorical answer is to say that the language of the guidelines which is in terms of burden of proof has been followed consistently since they were issued.

[17] Q And have objections been based on that standard contained in the guidelines? That is what I am asking, the guidelines, really, the guidelines will not tell us whether objections have been interposed; and that is the thrust of my question.

A You will excuse me if I read—

Q Certainly. Take as much time as you need.

(Short pause.)

A The guidelines state that if the Attorney General determines that the submitted change has a racially discriminatory purpose of [or] effect, he will enter an objection and will so notify the submitting authority. If the evidence as to purpose or effect of the change is conflicting and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof, applicable in the District Court, enter an objection and so notify the submitting authority.

Q Now, my question is—

A And both of those areas, both of those conditions, we have entered objections since the guidelines became effective.

* * * *

EXHIBITS TO DEPOSITIONS

Exhibit No. 9 of Deposition of Gerald W. Jones Deposition—Letter of June 30, 1972 from David L. Norman to Daniel R. McLeod

June 30, 1972

Honorable Daniel R. McLeod
Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Dear General McLeod:

This is in reference to your submission of Acts 1204 and 1205 to the Attorney General pursuant to the provisions of Section 5 of the Voting Rights Act of 1965. Act 1205 provides for a new reapportionment plan for the State Senate and extends the numbered post requirement to all multi-member districts in the House of Representatives. Act 1204 provides for the use of numbered posts in all multi-member bodies in the state. Because some of the provisions are similar and you have sought expedited consideration of both submissions to meet election schedules, this letter deals with both statutes.

Senate Plan

Act 1205 was adopted on May 5, 1972 after the three-judge district court in *Twiggs, et al.* v. *West, et al.* (D.C., S.C., Nos. 71-1106, 71-1123, 71-1211) ruled that a prior senate reapportionment (Act 932) deviated from the one-man, one-vote principle and contained an impermissible residency requirement. In one of the cases considered in that proceeding, plaintiffs also invoked the court's jurisdiction under the Fifteenth Amendment, claiming that multi-member senate districts and the numbered seat re-

quirement illegally diluted minority voting strength. In its opinion of April 7, 1972, the court considered and rejected these contentions. As you are also aware, on March 6, 1972, prior to the above opinion, we entered an objection to Act 932 which you had submitted under Section 5 of the Voting Rights Act. The view expressed in our letter was that under existing precedents we were unable to conclude that the combination of multi-member districts, numbered posts and majority run-off would not dilute and abridge the voting strength of racial minorities. Senate reapportionment Plan A of Act 1205 was considered and approved by the three-judge court on May 23, 1972 with the court finding specifically that Plan A "complies with the requirements of the Constitution of the United States, and it is therefore approved."

Our only function under Section 5 of the Voting Rights Act is to review submitted acts for Fifteenth Amendment compliance as nearly as possible in the same manner that the District Court for the District of Columbia would had the act been presented there as the subject of a declaratory judgment action. Under this standard, we feel constrained to defer to the above determination of the three-judge District Court. The District Court unquestionably had jurisdiction to consider the issues presented to it under both the Fourteenth and Fifteenth Amendments, and it has specifically found Plan A to be constitutional. Parties who feel aggrieved by its decision have full right to seek appellate review. It would in our view not be appropriate to read the Voting Rights Act as requiring or permitting the Attorney General to review a determination made by a United States District Court in the proper exercise of its statutory jurisdiction. For this reason, we enter no objection to the implementation of Plan A of Act 1205.

Numbered Seats

Section 3 of the Act 1205 and Act 1204 extend the requirement of running for numbered posts to all multi-member boards, commissions and other elective offices in the state, including the House of Representatives. In *Johnson* v. *West* (No. 72-680), the same three-judge court was requested to enjoin implementation of these acts until they had been submitted under Section 5 of the Voting Rights Act. On June 14, 1972, the court entered such an order and specifically found that these provisions had never been ruled upon by the court. Unlike the situation with respect to the State reapportionment plan, we review these acts without any prior judicial determination of constitutional validity or invalidity and with the burden of proof being on the submitting authority to show that the acts do not have the proscribed racial effect.

We have previously reviewed with you the various legal precedents indicating that the use of numbered seats and majority run-off requirements in multi-member electoral jurisdictions may impermissibly dilute the voting strength of cognizable racial minorities. (See our letter of March 6, 1972.) The question is whether we can certify that South Carolina's extension of the numbered seat requirement to virtually every multi-member office in the state does not have the dilutive effect described in those authorities.

According to information you furnished in connection with this submission, in addition to the House of Representatives, these requirements would apply to most of the state's school boards, county councils and municipal governing bodies. Many of these electorates contain cognizable racial minorities and we are unable to conclude that the racially dilutive effect some courts have described would not be occasioned by the numbered seat requirement.

For the above reasons, we must enter an objection on behalf of the Attorney General to the implementation of Act 1204 and Section 3 of Act 1205. As the Voting Rights Act provides, you may seek approval of these statutes in the District Court for the District of Columbia notwithstanding this objection.

Sincerely,

/s/ DAVID L. NORMAN,
Assistant Attorney General,
Civil Rights Division.

Exhibit No. 10 of Deposition of Gerald W. Jones—Letter of July 20, 1973 from J. Stanley Pottinger to Daniel R. McLeod.

July 20, 1973

Honorable Daniel R. McLeod
Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Dear Mr. Attorney General:

This is in reference to Act No. 1205 reapportioning the South Carolina Senate districts which was originally submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, on May 9, 1972.

On June 30, 1972 we notified you that no objection would be interposed to the senate redistricting because the Attorney General was "constrained to defer" to a determination made on May 23, 1972 by the three-judge court in *Twiggs, et al.* v. *West, et al.* (D. S. C. Nos. 71-1106, 71-1123, 71-1211). The Attorney General's decision not to object was subsequently challenged in the District Court for the District of Columbia, *Harper, et al.* v. *Richardson, et al.* (C. A. No. 1607-72). On August 11, 1972 the District Court entered an order suspending the 60-day period within which the Attorney General may enter an objection to changes submitted to him pursuant to Section 5. On May 16, 1973 the Court ordered the matter "remanded to the Attorney General of the United States for a reasoned decision in accordance with his statutory responsibilities" and required him to report to the Court within 60 days. Notice of appeal to the Court of Appeals for the District of Columbia was filed. Stay applications were denied in the District Court on June 11, 1973 and in the Circuit Court on July 13, 1973.

On July 16, 1973, in response to the Court's order, the Attorney General filed a decision based on a reconsideration of Act No. 1205, again deferring to the decision of the three-judge court in the *Twiggs* case. This opinion indicated that but for the decision in *Twiggs*, the Attorney General would have objected to the Senate plan. On July 19, the District Court ordered the Attorney General to consider the Senate plan "without regard to the decision of the Three Judge District Court in *Twiggs* v. *West*." Copies of the orders of the District Court and the Attorney General's decision of July 16, 1973 are enclosed for your information.

Pursuant to the Order of July 19, 1973 and for the reasons set forth in the Attorney General's decision of July 16, 1973 and in our March 6, 1972 letter objecting to Act 932, an earlier Senate plan, I am unable to conclude that Act No. 1205 does not have the effect of abridging voting rights on account of race. Therefore, on behalf of the Attorney General, I must interpose an objection to the implementation of the election procedure set forth in that statute.

Of course, as provided for by Section 5, you may institute an action in the District Court for the District of Columbia for a declaratory judgment that Act 1205 does not have the purpose and will not have the effect of abridging the right to vote on account of race, notwithstanding this objection.

Sincerely,

/s/ J. STANLEY POTTINGER
Assistant Attorney General
Civil Rights Division

STIPULATIONS

Filed Jan. 26, 1976

[Caption Omitted in Printing]

The parties to the above captioned action hereby agree and stipulate as follows:

1. That on or before July 11, 1972, the only communication from the United States Attorney General to the State of South Carolina conveying a decision to object or not to object to Section 2 of Act 1205 of 1972 was a letter dated June 30, 1975, from David L. Norman, Assistant Attorney General, Civil Rights Division, United States Department of Justice to Daniel R. McLeod, Attorney General of South Carolina.

2. That on or about July 1, 1972, the State of South Carolina began implementing Plan A of Act 1205 of 1972 and that Plan A was the basis upon which primary and general elections for the South Carolina Senate were conducted in August, September and November of 1972.

3. That the State of South Carolina has continuously enforced Plan A of Act 1205 of 1972 from a date on or about July 1, 1972, until the present.

4. That the 1973, 1974 and 1975 regular sessions and the 1973 special session of the General Assembly of South Carolina and its 1976 regular session to date have all been conducted on the basis of the Senate apportionment in Plan A of Act 1205 of 1972.

5. That from July 1, 1972, until the filing of this action on November 7, 1975, neither the plaintiffs in this action nor any other citizen of South Carolina commenced any legal action seeking an injunction or other relief against the enforcement of Plan A of Act 1205 of 1972, either on the ground that the State of South Carolina had

no authority to enforce Plan A under Section of the Voting Rights Act of 1965 or on any other grounds.

6. That the plaintiffs John Roy Harper II and Victoria DeLee in *Harper* v. *Kleindienst*, Civil Action No. 1607-72 (D. D. C. filed August 10, 1972) are the same persons as the plaintiffs John Roy Harper II and Victoria DeLee in *McCollum* v. *West*, Civil Action No. 71-1211 (D. S. C. filed December 7, 1971).

7. That on July 21, 1972, the plaintiffs in *McCollum* v. *West*, Civil Action No. 71-1211 (D. S. C. filed December 7, 1971) filed Notice of Appeal to the United States Supreme Court from the orders of May 23d, 1972, and June 9th, 1972, in that action; that on September 19, 1972, the aforesaid plaintiffs were granted an extension of time within which to docket the appeal by the United States Supreme Court; that the time within which to docket the appeal was extended to November 21, 1972, a date after the commencement of action in *Harper* v. *Kleindienst*, Civil Action No. 1607-72 (D. D. C. August 10, 1972); that the aforesaid plaintiffs did not perfect the appeal in *McCollum* v. *West*.

8. That the plaintiffs in *McCollum* v. *West*, Civil Action No. 71-1211 (D. S. C. filed December 7, 1971) purported to maintain a class action on behalf of, *inter alia*, black residents in Charleston County, South Carolina; that the plaintiffs in the instant action were then and are now black residents in Charleston County, South Carolina.

9. That the parties to the instant action stipulate to the introduction into the record in this action of the deposition of James H. Quackenbush, Jr., taken in the case of *Stevenson* v. *West*, Civil Action No. 72-45 (D. S. C. filed 1972).

10. That the South Carolina House of Representatives was reapportioned into single-member districts in

1974 following the objection of the United States Attorney General to implementation of a prior reapportionment plan contained in Act No. 836 of 1973; that on or about February 14, 1974, the United States Attorney General interposed objection to Act No. 836 of 1973; that on or about February 28, 1974, H2274, a bill reapportioning the House of Representatives into single-member districts was reported to the floor of the House by the House Judiciary Committee; that on or about March 12, 1974, H2274, as amended, passed the House of Representatives; that on or about April 10, 1974, H2274, as further amended passed the Senate; that on or about April 24, 1974, H2274, as further amended, was reported to the floors of both chambers by a joint free conference committee; that on or about April 24, 1974, the House ratified the joint free conference report; that on or about April 26, 1974, the Senate ratified the joint free conference report; that on or about April 26, 1974, H2274, as ratified, was signed into law by the Governor as Act No. 991 of 1974; that on or about April 26, 1974, Act No. 991 of 1974, was submitted to the United States Attorney General for review under Section 5 of the Voting Rights Act of 1965; that on or about June 21, 1974, the United States Attorney General notified the State of South Carolina that he would interpose no objection to Act No. 991 of 1974.

11. That on or about August 14, 1972, the State of South Carolina received notice of the order of August 11, 1972, of the United States District Court in *Harper* v. *Kleindienst*, Civil Action No. 1607-72 (D. D. C. filed August 10, 1972).

12. That the information contained in the first, second, third, seventh, eighth, and ninth paragraphs of an article entitled "Senate Plans Remap Suit," appearing on page one of *The State* newspaper, Columbia, South Carolina, on November 6, 1975, is substantially accurate.

13. That the parties to the instant action stipulate to the introduction into the record in this action of transcripts of the meetings of the Special Senate Reapportionment Committee held on June 3, July 29, August 11 and October 30, 1975.

/s/ RANDALL T. BELL
Attorney for Defendants

/s/ ARMAND DERFNER
Attorney for Plaintiffs

January 26, 1976.

PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT

Filed March 22, 1976

[Caption Omitted in Printing]

Pursuant to Rule 59(e), Fed. R. Civ. P., plaintiffs move to alter or amend the judgment of this Court entered March 12, 1976, denying their prayer for an injunction against the enforcement of Act 1205, Acts of the General Assembly of 1972, and dismissing their complaint. This motion is based on the following grounds:

1. There was and is an outstanding decision of the Attorney General of the United States, entered pursuant to section 5 of the Voting Rights Act, objecting to Act 1205. That objection was entered in conformity with a decree of a court of competent jurisdiction which (a) found that the 60-day period for objecting had not run when it assumed jurisdiction and tolled the time for objecting, (b) that the Attorney General's initial decision not to object was reviewable, and (c) that the Attorney General's initial decision was erroneous as a matter of law. *Harper* v. *Kleindienst*, 362 F. Supp. 742 (D.D.C. 1973), *aff'd Harper* v. *Levi*, 520 F.2d 53 (D.C. Cir. 1975). That decision has become final.

The Attorney General's decision, entered as it was pursuant to a lawful, final order of a court of competent jurisdiction, was entitled to "full faith and credit," and the decision in *Harper* was entitled to be followed under the doctrines of stare decisis and comity.

These doctrines are not discussed in this Court's opinion of March 12. The opinion does address one case relied on by plaintiffs, *Penn Central and N & W Inclusion Cases*, 389 U.S. 486 (1969), but reads the case to mean only the the Supreme Court's holding forecloses further litigation by non-parties, under the traditional doctrine

that lower courts are bound by holdings of appellate courts. If that were the meaning of *Penn Central*, though, only the lower courts would be foreclosed from considering arguments pressed by litigants who passed up opportunities to participate in the earlier stages of the litigation. The Supreme Court's opinion makes it clear, however, that those non-parties are foreclosed not only from re-litigating below, but that they are foreclosed from raising the matters in the Supreme Court itself.

2. In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), the Supreme Court held that agency action should be found to be reviewable in the absence of the absolutely clearest indication that Congress meant otherwise. Moreover, the Supreme Court in that case made it clear that the mere presence of a detailed statutory scheme of remedies, some of which were explicitly made reviewable, was not enough to preclude review of other types of agency action.

This Court holds that *Abbott Laboratories* is inapplicable here, chiefly because (a) the Attorney General's no-objection did not adjudicate any voter's substantial rights, and (b) Congress' concern with delay in the judicial process shows that it intended to insulate the Attorney General's no-objections from judicial review. Plaintiffs submit that these views arise from a misreading of the basic purposes of the Voting Rights Act.

First, the Court holds that the Attorney General's no-objection does not adjudicate any voter's substantial rights because voters still have an adequate remedy in a traditional fifteenth amendment case. But the Voting Rights Act was passed precisely because traditional fifteenth amendment remedies which depend upon judicial enforcement had been found by Congress to be inadequate, even after repeated attempts to streamline such litigation in the Civil Rights Acts of 1957, 1960,

and 1964. See, *e.g.*, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 327-28 (1966).

In the face of this history, there is no basis for dismissing the section 5 remedy as one which has "no binding legal consequence." Slip op. p. 13 or for holding that voters were not "adversely affected" by the Attorney General's no-objection, Slip op. p. 16.

Secondly, the March 12 opinion finds "compelling" reason to believe that Congress intended to insulate the Attorney General's decisions from judicial review. This reading of the purpose of section 5 is based upon passages of the legislative history which make it abundantly clear that the overriding purposes of Congress was to do away with judicial delays confronting voters challenging state enactments, not delays confronting states. See, *e.g.*, H.R.Rep. No. 439, 89th Cong., 1st Sess. 38 (1965) (cited at Slip Op. p.18n.26):

> "[A]s this Committee has returned to consideration of voting rights, there is consensus that a departure from traditional legislative method must be made, and a wholly new approach embraced; the burden of inherent delay and inertia of court process must be shifted to those who would withhold the right to vote." *

3. Since the filing of the parties' briefs in this case, the Supreme Court has decided the case of *East Carroll Parish* v. *Marshall*, —— U.S. —— (March 8, 1976). That case raises the question whether Act 1205 required Voting Rights Act preclearance at all. For the reasons set forth in the footnote,** plaintiffs believe that section

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* Likewise, the testimony of Attorney General Katzenbach, Slip Op. pp. 18-19, obviously refers to delay encountered by voters challenging State enactments, and the consequent frustration of purpose of the federal laws and Constitutional provisions guaranteeing the right to vote.

** Defendants have never argued that Act 1205 was not covered by section 5 of the Voting Rights Act. Such an argument would be

5 preclearance was required and that *East Carroll Parish* does not change the matter. If, however, it is held that Act 1205 comes within the court decree exception to section 5, then *East Carroll Parish* makes it plain that the use of multi-member districts in Act 1205 is beyond a court's discretion and that single-member districts are required. *East Carroll Parish* holds that in the absence of exceptional circumstances a district court adopting a plan should use single-member districts. The mere fact that a prior legislatively drawn plan used multi-member districts is not a special circumstance, *Connor* v. *Johnson*, 402 U.S. 690 (1971), especially where there has been a section 5 objection to the use of multi-member districts. Since no finding of exceptional circumstances has been made nor could be made in this case, a holding that section 5 preclearance was not required here would simply furnish an additional reason for requiring single-

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unavailing in any event. It is true that South Carolina, like East Carroll Parish, was barred under the Voting Rights Act from drawing a plan with multi-member districts, and that this Court on June 9, 1972, described Act 1205 in terms approaching those of a court plan. East Carroll Parish, however, focuses on "court-ordered plans resulting from equitable jurisdiction over adversary proceedings." Slip Op. p. 3 n.6. Act 1205 fails this description in two ways. First, the suit which resulted in the court order was a friendly suit. It was filed by the Attorney General of South Carolina on the day the predecessor Senate plan (Act 932) was passed, pursuant to a Concurrent Resolution of the General Assembly (S. 671) adopted by the South Carolina General Assembly two days earlier. That other parties may have entered the litigation, to seek to protect their interests, does not change the character of the suit. Secondly, the court order which advised the General Assembly that it need not comply with the Attorney General's section 5 objection was inappropriate, in light of Connor v. Waller, 44 L. Ed. 2d 486 (1975). If a suit of this sort, resulting in such an order, could defeat section 5 jurisdiction, the way would be open for any jurisdiction covered by the Voting Rights Act to defeat the basic purpose of Congress. *Compare* Georgia v. United States, 411 U.S. 526, 538 (1973).

member districts in the South Carolina Senate apportionment.*

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in plaintiffs' earlier memorandum, plaintiffs pray that this Court alter or amend the judgment entered March 12, 1976, by granting the relief prayed for in paragraph 17(c)-(g) of the complaint.

Respectfully submitted,

/s/ Armand Derfner
ARMAND DERFNER
FRANK EPSTEIN
RAY P. MCCLAIN
Epstein, McClain & Derfner
P.O. Box 608
Charleston, S.C. 29402
(803) 577-3170
Attorneys for Plaintiffs

---

* The order upholding Act 1205 is not insulated by the fact that it was entered four years ago. *See* Whitcomb v. Chavis, 403 U.S. 124, 162-63 (1971); Twiggs v. West, C.A. No. 71-1106, Order of June 9, 1972.

Of Counsel:

PAUL R. DIMOND
Lawyers' Committee for Civil
Rights Under Law
520 Woodward Building
733 - 15th Street, N.W.
Washington, D.C. 20005
(202) 628-6700

J. ROGER WOLLENBERG
MAX O. TRUITT, JR.
TIMOTHY N. BLACK
WILLIAM T. LAKE
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
MAY 28 1976
MICHAEL RODAK, JR., CLERK

No. 75-1583

FRANCES MORRIS, ET AL., APPELLANTS,

versus

L. MARION GRESSETTE, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(Three-Judge Court)

MOTION TO AFFIRM

DANIEL R. McLEOD,
Attorney General,
TREVA G. ASHWORTH,
Assistant Attorney General,
Post Office Box 11549,
Columbia, S. C. 29211,
RANDALL T. BELL,
University of South Carolina,
School of Law,
Columbia, S. C. 29208,
JAMES P. FIELDS,
Senate Judiciary Committee,
Columbia, S. C. 29211,
Attorneys for Appellees.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1583

FRANCES MORRIS, ET AL., APPELLANTS,

versus

L. MARION GRESSETTE, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
(Three-Judge Court)

MOTION TO AFFIRM

Pursuant to Rule 16 (1) (d) of the Rules of the Supreme Court of the United States, appellees move to affirm the final judgment and decree of the District Court on the ground that the State of South Carolina, having made a proper submission of its 1972 Senate reapportionment plan to the United States Attorney General and having received no objection to the plan within sixty days after submission, is authorized under Section 5 of the Voting Rights Act of 1965 to enforce the plan.

QUESTION PRESENTED

Whether, in view of the Attorney General's failure to object to the 1972 South Carolina Senate reapportionment plan within sixty days after it was properly submitted to him, the State of South Carolina may continue to enforce the plan under Section 5 of the Voting Rights Act of 1965?

STATEMENT OF THE CASE

This is a suit to enjoin enforcement of the 1972 Senate reapportionment plan (hereinafter the "Senate Plan"), enacted by the General Assembly of South Carolina in Act 1205 of 1972,[1] on the ground that it has not been precleared under Section 5 of the Voting Rights Act of 1965.[2] The appellants assert that the Senate Plan has not been precleared, while the appellees claim that it has. This difference arises because the Attorney General initially entered a "no-objection" letter to the Plan within the sixty-day period provided by Section 5, but more than a year later

[1] 57 STAT. 2384 (1972). Section 2 of Act 1205 contained two Senate reapportionment plans, Plan A and Plan B. Plan B was to take effect only if Plan A was declared invalid by the courts. It is Plan A that is the subject of this litigation. Section 3 of Act 1205 related to numbered seats in the House of Representatives. The Attorney General objected to Section 3 and it was never enforced.

[2] 42 U. S. C. § 1973c. The statute provides in pertinent part:

> Whenever a State . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . . such State . . . may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, . . . and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure, has been submitted by the chief legal officer or other appropriate official of such State . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. . . . Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

interposed an objection as a result of a court order stating that an objection to the Plan was required.[3]

Harper I

The instant case is the latest in a series of three lawsuits brought by the same class of plaintiffs seeking to overturn the reapportionment of the South Carolina Senate. The first suit, which will be referred to as *Harper I* in this motion,[4] was brought in 1971 challenging the reapportionment of the South Carolina Senate under Act 932 of 1971[5] (hereinafter the "1971 Plan") following the 1970 census. The *Harper I* plaintiffs claimed, *inter alia*, that the 1971 Plan abridged their right to vote on account of their race and color, because it was based on multimember election districts. On April 7, 1972, the District Court in *Harper I* struck down the 1971 Plan, finding that it violated the Fourteenth Amendment one man, one vote principle. In its order the *Harper I* Court expressly rejected the racial discrimination claims of the plaintiffs, claims that had been the subject of an extensive evidentiary record and full briefing and argument by counsel.[6] The District Court retained jurisdiction, but declined to draw a constitutional reapportionment plan itself unless

[3] *Harper v. Kleindienst*, 362 F. Supp. 742 (D. D. C. 1973), affirmed *sub nom. Harper v. Levi*, 520 F. 2d 53 (D. C. Cir. 1975).

[4] *McCollum v. West*, Civil Action No. 71-1211 (D. S. C. filed Dec. 7, 1971) (unreported). One of the named plaintiffs in *McCollum* was John Roy Harper II. *McCollum* was consolidated with several other cases challenging the 1971 Plan, all of which are sometimes referred to under the style of *Twiggs v. West*. This usage is misleading, since *Twiggs* was a Fourteenth Amendment suit presenting no question of minority voting rights *per se*. In this motion the Fourteenth Amendment suit will be called *Twiggs* and the Fifteenth Amendment suit called *Harper I*.

[5] 57 STAT. 2071 (1971).

[6] During the pendency of the *Harper I* case, the 1971 Plan was being reviewed by the Attorney General pursuant to a submission by the State under Section 5 of the Voting Rights Act. On March 6, 1972, the Attorney General interposed an objection to implementation of the 1971 Plan, stating that he was "unable to conclude" that the Plan did not abridge voting rights on account of race or color. Letter of March 6, 1972, from David L. Norman to Daniel R. McLeod.

the State legislature failed to do so within thirty days. On May 6, 1972, a new Senate reapportionment statute,[7] containing the Senate Plan now at issue, was signed into law by the Governor of South Carolina. This new plan was filed with the District Court for review under its retained jurisdiction to see if it satisfied the constitutional guidelines established in the Court's April 7th order. On May 23, 1972, the District Court entered an order approving the Senate Plan. A further order of June 9, 1972, rejected the claim of the *Harper I* plaintiffs that the Plan was racially discriminatory. From these decisions two appeals were noticed to this Court. One, *Powell v. West,* challenged the District Court's approval of the Senate Plan as an "advisory opinion," since the Court had not requested the parties in *Twiggs* to present their views on it. This Court affirmed the District Court's order in the *Powell* appeal.[8] The second appeal, noticed by the *Harper I* plaintiffs, was based on Fifteenth Amendment grounds. This appeal was not perfected,[9] as will be more fully discussed below.

Section 5 Submission of the Senate Plan

Three days after the Senate Plan was signed into law, it was submitted to the Attorney General for review and preclearance under Section 5 of the Voting Rights Act. The submission was received by the Attorney General on May 12, 1972, and was considered by him to be complete under his own guidelines[10] as of that date. The sixtieth calendar day after May 12, 1972, was July 11, 1972. On June 30, 1972, the Attorney General responded to the submission of the Senate Plan in a letter addressed to Daniel R. McLeod, the South Carolina Attorney General. In the

[7] Act 1205 of 1972, 57 STAT. 2384.
[8] *Powell v. West,* 413 U. S. 901 (1973) (memorandum opinion).
[9] See Stipulations, Par. 7, Appendix B, *infra,* at 12a.
[10] 28 C. F. R., § 51 *et seq.*

letter the Attorney General stated that he interposed no objection to the Senate Plan.[11] It is conceded that, other than this letter of June 30th, the Attorney General conveyed no decision to the State of South Carolina either objecting or not objecting to the Senate Plan on or before July 11, 1972.[12]

Harper II

On August 10, 1972, thirty days after the sixty day period for objecting to the Senate Plan had expired, two of the named plaintiffs in *Harper I,* John Roy Harper II and Victoria DeLee, commenced an action in the District of Columbia challenging the Attorney General's failure to object to the Senate Plan. This suit,[13] which will be referred to as *Harper II* in this motion, rested on a claim that the Attorney General had erroneously taken into consideration the decision in *Harper I* in reaching his own decision not to object to the Senate Plan. *Harper II* was brought on behalf of the same class of plaintiffs as *Harper I.* It is noteworthy that the period in which the *Harper I* plaintiffs could perfect their appeal had not yet expired, and would not expire for over three months, at the time *Harper II* was commenced.[14] The plaintiffs chose to bring the *Harper II* action and chose not to press their *Harper I* claim that the Senate Plan was racially discriminatory on appeal to this Court.

On August 11, 1972, the single-judge District Court in *Harper II* entered an interlocutory order purporting to extend the time during which the Attorney General might interpose an objection to the Senate Plan. This order was based on a finding of "fact" that the time in which the

[11] See Appendix C, *infra,* at 14a.
[12] See Stipulations, Par. 1, Appendix B, *infra,* at 11a.
[13] *Harper v. Kleindienst,* 362 F. Supp. 742 (D. D. C. 1973). For "historical" reasons the case has been variously styled *Harper v. Kleindienst, Harper v. Richardson, Harper v. Bork, Harper v. Saxbe,* and *Harper v. Levi.*
[14] See Stipulations, Par. 7, Appendix B, *infra,* at 12a.

Attorney General might interpose objection to the Senate Plan under Section 5 had not expired.[15] Some nine months later, on May 16, 1973, the District Court entered an order finding that the Attorney General's refusal to object to the Senate Plan was clearly erroneous. Seemingly adopting the plaintiffs' contention that the Attorney General "made no findings at all" in deciding not to object to the Senate Plan, the District Court ordered the Attorney General to make a "reasoned decision in accordance with his statutory duty."[16] On July 19, 1973, the District Court entered a second order stating that Section 5 of the Voting Rights Act required the Attorney General to object to the Senate Plan. Pursuant to the District Court's order, the Attorney General objected to the Senate Plan on July 20, 1973, over one year after the expiration of the sixty-day period.

The District Court's order in *Harper II* was affirmed by a three-judge panel of the Court of Appeals, one judge dissenting, on July 24, 1975.[17] That review became final on October 22, 1975, when the time for filing a petition for a writ of *certiorari* in this Court expired.

Enforcement of the Senate Plan

It is important to emphasize that South Carolina has scrupulously adhered to the requirements of Section 5 with respect to the Senate Plan. The Plan was submitted to the Attorney General promptly after it was enacted into law. Although the *Harper I* court approved the Plan as satisfying the requirements of the Fifteenth Amendment, the State did not enforce it until the Attorney General had

[15] See Appendix E, *infra*, at 19a. The District Court also directed notice of the proceedings to be given to the State of South Carolina. The State of South Carolina received notice of the *Harper II* proceedings on or about August 14, 1972. See Stipulations Par. 11, Appendix B, *infra*, at —.

[16] 362 F. Supp. at 746.

[17] *Harper v. Levi*, 520 F. 2d 53 (D. C. Cir. 1975).

entered no objection on June 30, 1972.[18] At that time the 1972 primary elections were imminent and so the State took immediate steps to implement the Plan in order to allow sufficient time to prepare for a fair and orderly election process. The 1972 primary and general elections were held under the Plan. No member of the appellants' class sought to enjoin enforcement of the Plan on the ground that the Attorney General's non-objection was invalid, either prior to or within a reasonable time after the 1972 elections.[19]

Appellants intimate that South Carolina has deliberately "ignored" the law or somehow acted in bad faith by continuing to enforce the Senate Plan.[20] Both the *Harper II* court[21] and the District Court below[22] stated that it was not necessary for South Carolina to intervene in the *Harper II* litigation. It is true that South Carolina is taking steps to conduct the 1976 Senate elections under the Senate Plan. It is also true that the *Harper I* court found that the Plan was *not* racially discriminatory, that the Attorney General did not interpose objection to the Plan within the sixty days prescribed by the Voting Rights Act, and that the District Court in this case held that South Carolina may continue to enforce the Plan under the Voting Rights Act.

The Proceedings Below

The appellants filed this suit on November 7, 1975, alleging in their complaint that South Carolina had not obtained authority to enforce the Senate Plan under Section 5. It was conceded by all parties at the outset that the racial discrimination issues litigated in *Harper I* were not presented in this case and were not being relitigated.

[18] See Stipulations, Pars. 1 and 2, Appendix B, *infra*, at 11a.

[19] See Stipulations, Par. 5, Appendix B, *infra*, at 11a.

[20] Jurisdictional Statement, at 9-10.

[21] 362 F. Supp. at 744.

[22] See Jurisdictional Statement, at 9a-12a.

It was also conceded by all parties that the Senate Plan is legislation covered by the Voting Rights Act and that compliance with the preclearance provisions of Section 5 of the Act is a prerequisite to implementation of the Plan by South Carolina. The appellants presented three main arguments below: (1) they claimed that the State of South Carolina was bound by the *Harper II* decision and, therefore, could not present a defense on the merits; (2) they claimed that the *Harper II* decision was correct in holding that the Attorney General's non-objection was reviewable under the Administrative Procedure Act; and (3) they claimed that the Attorney General was legally erroneous in considering the *Harper I* decision as a basis for his non-objection. The appellees argued in reply that: (1) the State was not estopped by *Harper II* from contesting on the merits; (2) that the Attorney General's failure to object within sixty days authorized South Carolina to enforce the Senate Plan; (3) that the Attorney General's non-objection was not reviewable under the APA; (4) that the Attorney General's subsequent objection to the Senate Plan was additionally invalid because it was interposed by order of a court acting without jurisdiction; and (5) that the Attorney General's decision to defer to the *Harper I* decision was legally proper and within his discretion under Section 5.

The United States filed an *amicus curiae* memorandum, in which it declined the invitation of the District Court to participate in the case on the ground that it was "unable at this time to fully address the issues in this case."[23] Attorneys from the Justice Department also appeared at the hearing before the three-judge court, but declined to participate in oral argument.

On March 12, 1976, the District Court filed its opinion and order. On the question of collateral estoppel, it held

[23] Amicus Memorandum of the United States, at 4.

that South Carolina was not precluded by *Harper II* from defending the suit on the merits. On the merits, the District Court held that the Attorney General's failure to object within the sixty day period was not reviewable under the APA because

> the action of the Attorney General under § 5 . . . is (1) not adjudicatory, and (2) any party with standing who was dissatisfied with his action had an "adequate remedy in a court," and (3) there were not simply "persuasive" but compelling reasons to believe nonreviewability of that action was "the purpose of Congress."[24]

The court, therefore, concluded that

> the determination made by the Attorney General is not reviewable and, when he failed within sixty (60) days after submission to interpose an objection to the South Carolina Senate reapportionment as provided in Act 1205, the State of South Carolina was automatically authorized to enforce it; subject to the right of any proper party or parties to assail the constitutional validity of that legislation in an appropriate action.[25]

In view of this holding, the District Court did not reach or decide the remaining issues raised by the parties.[26]

Appellants' subsequent motions to alter or amend the judgment and for an injunction pending this appeal were denied by the District Court on March 30, 1976. Appellants filed notice of appeal to this Court on April 16, 1976.

[24] Jurisdictional Statement, at 14a.
[25] Jurisdictional Statement, at 25a.
[26] Appellants' assertions that the court below did not "dispute" the authority of the *Harper II* district court (Jurisdictional Statement, at 11, 14) should be understood in this context. The court below neither denied nor affirmed; it simply did not reach the question.

GROUNDS FOR GRANTING THE MOTION TO AFFIRM

I

The District Court was manifestly correct in holding that, because the Attorney General failed within 60 days after submission to interpose objection to the South Carolina Senate reapportionment plan, the State of South Carolina is authorized to enforce the plan.

Section 5 of the Voting Rights Act provides that a voting change "may be enforced" by the State if it

> . . . has been submitted by the chief legal officer . . . of such State . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . .[27]

It is undisputed that the Senate Plan was submitted by the State of South Carolina for review and preclearance under Section 5. The testimony of Gerald W. Jones, Chief of the Voting Rights Section of the Justice Department, shows that the submission was complete and the sixty-day period began to run on May 12, 1972:

> [Q.] In administering Section 5 under your regulations, is it correct that the department must at some point in considering a submission determine that the 60-day period has begun to run?
>
> A. That is correct.
>
> Q. Is it the policy of the department under existing procedures to treat that period as having begun to run when the submission is complete; that is, when the department has received the information which it considers necessary to consider that submission from the submitting authority?
>
> A. That is correct.

[27] 42 U. S. C., § 1973c.

> Q. Now, with respect to Act 1205, was the date which the department determined the 60-day period had begun to run May 12 of 1972?
>
> A. As I indicated before, we took the position in the District Court in this litigation in the Harper litigation that the submission of Act 1205 was complete on the date we initially received it.[28]

The sixtieth day after May 12, 1972, was July 11, 1972, and it is conceded that the Attorney General did not interpose an objection to the Senate Plan on or before that latter date.[29] The only response to the submission of the Senate Plan before July 11, 1972, was the Attorney General's letter of June 30, 1972, in which he stated, "we enter no objection to the implementation of Plan A of Act 1205."[30]

These were the undisputed facts before the District Court upon which it concluded that South Carolina had complied with Section 5 and was, therefore, entitled to enforce the Senate Plan. The correctness of the District Court's conclusion is obvious from the face of the statute. As was stated by Mr. Justice Blackmun in *State Board of Election Commissioners v. Evers:*[31]

> . . . Section 5, it seems to me, plainly and clearly provides that if the procedure has been properly submitted to the Attorney General, as it was, "and the Attorney General has not interposed an objection within sixty days after such submission," as he did not, the proposed statutory changes "may be enforced" without the court proceeding in the District of Columbia and without resubmission to the Attorney General. Here the proposal was properly submitted to the Attorney General and he took no action by way of interposing an objection within the allowed 60 days. I do not see how the statute can be read or construed in

[28] Deposition of Gerald W. Jones, at 38, ff. 1-18.
[29] Stipulations, Par. 1, Appendix B, *infra*, at 11a.
[30] Appendix C, *infra*, at 14a.
[31] 405 U. S. 1001, 1003-4 (1972) (concurring opinion).

any way other than to the effect that the conditions of its proviso were fulfilled and that the proposed new legislation was therefore enforceable subject, of course, to the statute's recognized exception as to any contest on the merits. I see nothing in *Perkins v. Matthews*, 400 U. S. 379, 385, 27 L. Ed. (2d) 476, 483, 91 S. Ct. 431 (1971), which supports a contrary conclusion.

II

The District Court was manifestly correct in holding that a determination made by the Attorney General under Section 5 of the Voting Rights Act is not reviewable under the Administrative Procedure Act.

Speaking to the preclearance requirement of the Voting Rights Act in *Allen v. State Board of Elections*,[32] this Court stated:

> Once the State has successfully complied with the § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; *there is no further remedy provided by § 5.*

The District Court's decision that review of Section 5 determinations is not available to private parties under the Administrative Procedure Act merely gives effect to the *Allen* rule in this case, making summary affirmance by this Court appropriate.

Under the express terms of the Administrative Procedure Act, agency action is not reviewable in three situations:

(1) where agency action is committed to agency discretion by law;[33]

(2) where there is other adequate remedy in the courts;[34] and

[32] 393 U. S. 544, at 549-50 (emphasis added).
[33] 5 U. S. C., § 701 (a) (2).
[34] 5 U. S. C., § 704.

(3) where the statute authorizing agency action precludes judicial review.[35]

Prior decisions of this Court suggest that each of these exceptions applies to decisions of the Attorney General under Section 5 of the Voting Rights Act.

Committed to Agency Discretion. In *Georgia v. United States*,[36] this Court emphasized that the implementation of Section 5 is largely a matter for the Attorney General's discretion. In part II of the *Georgia* opinion, the Court noted that Section 5 is "silent as to the procedures the Attorney General is to employ in deciding whether or not to object to state submissions, as to the standard governing the contents of those submissions, and as to the meaning of the 60-day time period in which the Attorney General is to object, if at all."[37] The Court also recognized that the legal standards of review which the Attorney General was to apply were not specified in the Act and was, therefore, a matter committed to his discretion: "It is not necessary to hold that this allocation of the burden of proof by the Attorney General was his only possible choice under the Act, in order to find it a reasonable means of administering his § 5 obligation."[38] The clear thrust of this analysis is that the administration of Section 5 is a matter committed by Congress to the Attorney General's discretion.

Another telling indication that the Attorney General's preclearance decisions are committed to agency discretion is to be found in the language of Section 5 itself, which speaks in terms of the Attorney General's "failure to object" as allowing the State to enforce a submitted voting change. The 1975 amendments to Section 5 make it even clearer that it is within the Attorney General's discretion

[35] 5 U. S. C., § 701 (a) (1).
[36] 411 U. S. 526 (1973).
[37] *Id.* at 536.
[38] *Id.* at 538.

to make no decision on a submitted change by speaking both of "an affirmative indication . . . that no objection will be made" *and* "the Attorney General's failure to object." [39] As Judge MacKinnon observed in *Harper II:*

> Surely no one would contend that if the Attorney General took no action whatsoever, as is clearly authorized by the statute, that inaction could be subject to judicial review under the APA. It is hard to imagine a clearer instance of a matter "committed to agency discretion by law." [40]

Other Adequate Remedy in the Courts. Section 5 of the Voting Rights Act explicitly provides that

> Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object . . . shall bar a subsequent action to enjoin the enforcement of such qualification, prerequisite, standard, practice, or procedure.[41]

Thereby Congress was careful to assure the right of private parties to seek a judicial determination of the validity of a voting change if they disagreed with the Attorney General's preclearance decision. This Court recognized as much in the *Allen* case when it expressly mentioned the right of private litigants to bring traditional injunctive suits although the State had obtained Section 5 preclearance of its voting change.[42] Since other judicial remedies are available in the courts, review under the Administrative Procedure Act is unavailable and unnecessary to protect private parties' rights.[43]

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[39] 42 U. S. C., § 1973c (1975).
[40] 520 F. 2d at 73 (dissenting opinion). Cf. *United Jewish Organization of Williamsburgh v. Wilson*, 510 F. 2d 512, 520, n. 16 (2d Cir. 1975).
[41] 42 U. S. C., § 1973c.
[42] See *Allen v. State Board of Elections*, *supra*, at 549-50.
[43] See *Warner v. Cox*, 487 F. 2d 1301 (5th Cir. 1974); *State of Minnesota v. Weinberger*, 359 F. Supp. 789 (D. Minn. 1973); *Vogel v. Gottschalk*, 350 F. Supp. 865 (E. D. Va. 1972).

Preclusion. Following the rule enunciated by this Court in *Abbot Laboratories v. Gardner,*[44] the District Court found that "there were not simply 'persuasive' but compelling reasons to believe non-reviewability of [the Attorney General's] action was 'the purpose of Congress'" [45] under Section 5. Again, previous decisions of this Court confirm the correctness of the District Court's view.

In the *Allen* case, this Court recognized that the congressional purpose in providing for submission of voting changes to the Attorney General was to give the covered State "a rapid method of rendering a new state election law enforceable." [46] The legislative history of Section 5 also makes it quite clear that Congress intended to provide an expeditious method by which a State could obtain authority to enforce a voting change without the delays and burdens of litigation in court.[47] To permit judicial review under these circumstances would be to impose on the State the very burden of litigation and delay that Congress intended to avoid. The District Court stated this point quite clearly in its opinion:

> The delays that would follow, if judicial review of the Attorney General's determination were found to exist, are well illustrated by the record in *Harper,* which involved no real factual review but concerned only an issue of law. The action was begun in the District Court in August, 1972, but the District Court, though the parties submitted the case on an agreed statement of facts, did not decide it until the middle of May, 1973, almost ten months later. The appeal from that decision was not heard until September, 1974, and the opinion of the Court of Appeals was not filed until the end of July, 1975. In other words, the right of the

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[44] 387 U. S. 136 (1967).
[45] Jurisdictional Statement, at 14a.
[46] 393 U. S. at 549.
[47] See H. R. Rep. No. 439, 89th Cong., 1st Sess., at 38 (1965); *Hearings on S. 1564 Before the Senate Committee on the Judiciary,* 89th Cong., 1st Sess., pt. 1, at 69-73, 237 (1965).

State to enforce its legislation, if § 5 is to be construed as plaintiffs contend and as *Harper* held, would have been delayed from May 2, 1972 to the end of July, 1975, a period of over three years. It was this very delay, so graphically demonstrated by the record in this case which Congress, by providing for Attorney General clearance, sought to avoid.[48]

Given the large measure of discretion invested in the Attorney General by Section 5, the express congressional provision of an "other adequate remedy in a court" in the statute, and the purpose of Congress to avoid the delay of judicial proceedings in obtaining preclearance, it may be said that the purpose to preclude judicial review "is fairly discernible in the statutory scheme." *Data Processing Service v. Camp,* 397 U. S. 150, 157 (1970). To allow judicial review under the Administrative Procedure Act would be to defeat that discernible purpose.

III

The arguments (a) that the Senate Plan is "plainly discriminatory" and (b) that the Senate Plan is a "court-ordered" plan were not raised by the pleadings, were not briefed or argued below, and were not decided by the District Court in its opinion on the merits. These assertions are clearly insubstantial and are improperly raised by appellants in the Jurisdictional Statement.

In the Jurisdictional Statement appellants have interjected two questions which are not at issue in this appeal. The first is raised by their assertion that the Senate Plan is "plainly discriminatory;" the second by their argument, admittedly inconsistent with their own position, that the Senate Plan is a "court-ordered" plan.

[48] Jurisdictional Statement, at 22a, n. 28.

The Racial Discrimination Argument. A key ingredient in appellants' statement of the case and argument[49] is the repeated assertion that the Senate Plan is racially discriminatory. This *assertion* is no doubt designed to give appellants' position an emotive appeal that it would otherwise lack; but in the context of this case it is nothing more than that—a bald, insubstantial assertion.

The Senate Plan was challenged by appellants and their class in *Harper I* on the ground, *inter alia,* that its use of multimember districts is racially discriminatory. The parties engaged in discovery on that issue and a full evidentiary record was presented to the *Harper I* Court in an attempt to prove the allegations that black voting strength is diluted by the Plan. Racial discrimination was fully briefed and argued by the parties. After thorough scrutiny of the Plan against this background of litigation, the *Harper I* court found that it was not racially discriminatory. Appellants and their class chose not to appeal that finding to this Court.

All parties to this case have conceded from the beginning that the questions litigated in *Harper I* are not presented in this case and are not being relitigated. On this understanding, appellees did not pursue discovery on the question of racial discrimination and no evidence was entered into the record to show that the Plan is or is not discriminatory. The question of racial discrimination was not briefed in the court below nor was it argued there. Nothing in the opinion of the District Court addresses the question.

It is clear from the decisions of this Court that dilution of minority voting strength will not be presumed, it must be proved by evidence.[50] The presumption in favor

[49] See Jurisdictional Statement, 4-5, 11-12.

[50] *Whitcomb v. Chavis,* 403 U. S. 124, 143-44 (1971); *White v. Regester,* 412 U. S. 755, 765-66 (1973); *Champion v. Meier,* 420 U. S. 1, 17 (1975).

of the non-discriminatory character of the Senate Plan is strengthened by the *Harper I* decision on that precise question. *Harper I* has never been challenged by appellants or the members of their class and the questions raised therein are conceded by them to be not presented in this case. It follows that appellants' naked statements that the Senate Plan is plainly discriminatory are improper and as such ought to be ignored by this Court.

The Court-Ordered Plan Argument. The State of South Carolina did not below, and does not now, contend that the Senate Plan is a "court-ordered" plan within the meaning of *East Carroll Parish School Board v. Marshall.*[51] The District Court clearly understood the position of the parties when it said

> It is conceded by all parties that the challenged legislation is within the coverage of the Voting Rights Act of 1965 and that compliance with § 5 of that Act was a condition to the enforcement of such legislation.[52]

The question was first raised after the decision on the merits by the appellants in their Rule 59 motion to alter or amend judgment, filed with the District Court on March 22, 1976. The District Court obviously considered the point to be insubstantial, since it denied the motion without opinion.[53] How a question on which the appellants, the appellees, and the court below are in agreement can be the basis for an appeal to this Court is beyond the comprehension of the appellees, although we admit that it is

[51] —— U. S. ——, 96 S. Ct. 1083 (1976).

[52] Jurisdictional Statement, at 2a.

[53] Any argument based on *East Carroll Parish* is plainly insubstantial on the facts of this case. In *East Carroll Parish* the District Court acting under its retained jurisdiction, instructed a Louisiana police jury and school board to file reapportionment plans with the court after the 1970 census. This action was necessary because neither the police jury nor the school board had authority to reapportion itself under Louisiana law. Reapportionment plans were filed and the District Court entered an order adopting them. Thus the plans were implemented solely on the authority of the court order. By contrast, the Senate Plan in this case was enacted by the General Assembly of South Carolina acting with full legislative authority under the State Constitution. The Plan became law upon signature by the Governor on May 6, 1972, although it was not enforced until June 30, 1972, when the Attorney General stated that he had no objection to its implementation. This Court itself noted that had the plan in *East Carroll Parish* been enacted on the authority of the police jury, it would not have been a court-ordered plan and "clearance under § 5 of the Voting Rights Act would clearly have been required." *East Carroll Parish School Board v. Marshall,* —— U. S. ——, 96 S. Ct. 1083, at 1085, n. 6 (1976).

not the first time that appellants' theories of adjudication have puzzled us in this case.

CONCLUSION

For all the reasons stated above, this Court should affirm the judgment below without a hearing.

Respectfully submitted,

DANIEL R. McLEOD,
Attorney General,

TREVA G. ASHWORTH,
Assistant Attorney General,
Post Office Box 11549,
Columbia, S. C. 29211,

RANDALL T. BELL,
University of South Carolina,
School of Law,
Columbia, S. C. 29208,

JAMES P. FIELDS,
Senate Judiciary Committee,
Columbia, S. C. 29211,

Attorneys for Appellees.

May 28, 1976.

APPENDICES

APPENDIX A

PLEADINGS BELOW

Civil Action No. 75-1998

COMPLAINT

1. This is a complaint pursuant to section 5 of the Voting Rights Act, 42 U. S. C. § 1973c, for declaratory and injunctive relief against the enforcement of Act 1205, Acts of the South Carolina General Assembly of 1972.

2. Jurisdiction arises under 28 U. S. C. §§ 1331 and 1343, and 42 U. S. C. § 1973c. The matter in controversy, exclusive of interest and costs, exceeds the value of $10,000.00.

3. Plaintiffs Frances Morris and Maxine Woods are citizens of the United States and residents and qualified electors of Charleston County, South Carolina. Each is Black.

4. Each plaintiff sues in her own behalf, and, pursuant to Rule 23(b)(2), Fed. Rules Civ. Proc., on behalf of all others similarly situated. The class includes all qualified electors of South Carolina, particularly all Black qualified electors. The class is so numerous that joinder of all members is impracticable. The questions of law and fact are common to the class. Plaintiffs' claims are typical of the claims of the class, and plaintiffs will fairly and adequately represent the interests of the class. Defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

5. Defendant Gressette is a member of the South Carolina Senate and is President Pro Tem of that legislative body; Defendant Edwards is the Governor of the State of South Carolina and in his capacity as Governor of the State of South Carolina is charged with the execution and enforcement of the Constitution and Laws of the State of South Carolina, including all laws pertaining to elections; Defendant Harvey is the Lieutenant Governor of the State

of South Carolina and President of the South Carolina Senate and, as such, is the presiding officer of that legislative body; Defendant Thomas is the Clerk of the South Carolina Senate and is charged with the preparation of calendars, journals and other records of the Senate which list matters of pending business and reflect action taken on all legislative items before that body; Defendants Callison, Townsend, Chapman, Morris and Gray are members of and constitute the South Carolina State Election Commission and, as such, are charged with general administration of elections for State Senate and other state offices; Defendant Ellisor is Executive Director of the South Carolina Election Commission and as such is responsible for the actual administration of the responsibilities vested in the South Carolina Election Commission; Defendant McLeod is Attorney General of the State of South Carolina and chief law officer of the State of South Carolina, and is responsible under 42 U. S. C. § 1973c for seeking and obtaining authority to enforce voting changes (such as Act 1205) which are covered by that section; Defendant Thornton is Secretary of State of South Carolina, is custodian of the Acts of the General Assembly and is also responsible for preparing, signing, recording and issuing commissions of office including those for the office of State Senate.

6. Defendant Gressette is sued in his own behalf and, pursuant to Rule 23(b)(2), Fed. R. Civ. P., on behalf of the class of all members of the South Carolina Senate. The class is so numerous that joinder of all members is impracticable. The questions of law and fact are common to the members of the class. Defendants' claims are typical of the claims of the class, and defendants will fairly and adequately represent the interests of the class. Plaintiffs have acted on grounds generally applicable to the defendant class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

7. Each defendant and member of the defendant class is sued in his individual and official capacities.

8. Each defendant and member of the defendant class has, at all times relevant herein, acted and threatened to act under color of law.

9. The State of South Carolina is a covered jurisdiction pursuant to 42 U. S. C. §§ 1973b and 1973c. 30 Fed. Reg. 9897 (August 7, 1965).

10. On May 6, 1972, the State of South Carolina adopted Act 1205, Acts of the General Assembly of 1972, reapportioning the South Carolina Senate.

11. Act 1205 constitutes a "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964."

12. The State of South Carolina has not gained authority to enforce Act 1205 in the manner required by 42 U. S. C. § 1973c. *Harper v. Levi*, 520 F. 2d 53 (D. C. Cir. 1975).

13. South Carolina's failure to gain authority pursuant to 42 U. S. C. § 1973c for enforcement of Act 1205 renders that act ineffective as law and unenforceable.

14. Notwithstanding the unenforceability of Act 1205, the defendants intend to enforce that Act at statewide elections to be held in 1976, and to conduct elections for, and authorize the seating of, members of the South Carolina Senate according to the provisions of Act 1205.

15. On information and belief, members of the defendant class have decided and announced that they will enforce Act 1205 and will not comply with 42 U. S. C. § 1973c unless ordered by this Court.

16. The enforcement of Act 1205 will violate the rights of plaintiffs and members of their class as guaranteed by the Voting Rights Act, 42 U. S. C. § 1973 *et seq.*

17. Plaintiffs have no adequate remedy at law for this violation of their rights. Unless this Court enjoins enforcement of Act 1205, plaintiffs will suffer irreparable injury to their precious right to vote.

WHEREFORE, plaintiffs pray that this Court grant the following relief:

a. Order that a three-judge court be convened, pursuant to 42 U. S. C. § 1973c.

b. Certify the plaintiff and defendant classes pursuant to Rule 23(b)(2), Fed. R. Civ. P.

c. Grant a permanent injunction against the enforcement of Act 1205.

d. Enjoin the conduct of any elections or preparation for elections for the South Carolina Senate pursuant to Act 1205 or any other reapportionment plan which has not been lawfully cleared pursuant to 42 U. S. C. § 1973c.

e. Declare that this Court will itself devise an interim plan for the conduct of the 1976 elections and for the seating of Senators for terms of such length as may be deemed equitable, if (1) by January 31, 1976, the appropriate defendants have not submitted a new reapportionment plan for clearance pursuant to 42 U. S. C. § 1973c, or if (2) by March 31, 1976, clearance pursuant to 42 U. S. C. § 1973c has not been obtained for a new reapportionment plan.

f. Award the plaintiffs their costs of suit and reasonable attorneys' fees.

g. Grant such other and further relief as may be appropriate.

EPSTEIN, McCLAIN & DERFNER,
P. O. Box 608,
Charleston, S. C. 29402,
(803) 577-3170
Attorneys for Plaintiffs.
By: /s/ ARMAND DERFNER

PAUL R. DIMOND
Lawyers Committee for Civil Rights Under Law
520 Woodward Building
Washington, D. C. 20005

TRUE COPY
Test:
MILLER C. FOSTER, JR., Clerk
/s/ CHARLOTTE LIENLOPHER
By: Deputy Clerk

Charleston, S. C.
November 6, 1975

Civil Action No. 75-1998

ANSWER

Come now the Defendants in the above-styled action and in answer to the Complaint herein do say and allege:

In Answer to the Complaint and as a First Defense

1. Defendants admit the allegations of Paragraph 1 of the Complaint insofar as those allegations merely state the purpose of Plaintiffs in instituting this action.

2. Defendants admit only so much of Paragraph 2 of the Complaint as alleges that jurisdiction arises under 28 U. S. C. § 1343 and 42 U. S. C. § 1973c. Defendants deny the remaining allegations of Paragraph 2. Defendants further allege that this action is proper for determination by a three judge court as required by 28 U. S. C. § 2281 and 42 U. S. C. § 1973c and that declaratory judgment is appropriate under 28 U. S. C. § 2201.

3. Defendants, being without sufficient knowledge or information as to the allegations of Paragraph 3 of the Complaint, deny the same.

4. Defendants deny the allegations of Paragraph 4 of the Complaint.

5. Defendants admit the allegations of Paragraph 5 of the Complaint except that statement alleging the defendant Morris to be a member of the South Carolina State Election Commission as the defendant Morris is no longer a member of the Commission and has been replaced by Raymond A. Harris.

6. Defendants admit the allegations of Paragraph 6 of the Complaint.

7. Defendants admit only so much of Paragraph 7 of the Complaint as alleges that each defendant and member of the defendant class is sued in his official capacity.

8. Defendants admit only so much of Paragraph 8 of the Complaint as alleges that each defendant and member of the defendant class has, at all time relevant herein, acted under color of state law. Defendants deny the remaining allegations of Paragraph 8.

9. Defendants admit the allegations of Paragraphs 9, 10 and 11 of the Complaint.

10. Defendants deny the allegations of Paragraphs 12 and 13 of the Complaint. Defendants further allege in answer to Paragraphs 12 and 13 of the Complaint that by letter of June 30, 1972, from David L. Norman, Assistant Attorney General, Civil Rights Division, to Honorable Daniel R. McLeod, Attorney General, State of South Carolina, the United States Attorney General stated: ". . . we enter no objection to the implementation of Plan A of Act 1205." This decision to enter no objection to Plan A of Act 1205 was lawful, valid, and within the scope of the authority vested in the United States Attorney General by 42 U. S. C. § 1973c and constitutes authority under which the State of South Carolina and the Defendants may enforce Plan A of Act 1205 of 1972.

11. Defendants admit only so much of Paragraph 14 of the Complaint as alleges that the defendants intend to enforce Act 1205 of 1972 at statewide elections to be held in 1976 and to conduct elections for, and authorize the seating of, members of the South Carolina Senate according to the provision of Act 1205. Defendants deny the remaining allegations of Paragraph 14.

12. Defendants deny the allegations of Paragraphs 15, 16 and 17 of the Complaint.

13. All allegations of the Complaint not hereinabove expressly admitted are hereby denied.

As A Second Defense

14. Defendants reallege and incorporate in this defense, as if fully set out herein, the allegations of Paragraphs 1 through 13 above.

15. By letter of May 9, 1972, from Hardwick Stuart, Jr., Assistant Attorney General, to Assistant Attorney General, Civil Rights Division, the Defendant McLeod, as chief legal officer of the State of South Carolina submitted Act 1205 of 1972 to the United States Attorney General pursuant to 42 U. S. C. § 1973c.

16. On May 17, 1972, the United States Attorney General gave official notice that the submission of Act 1205 of

1972 had been received on May 12, 1972, and that the Attorney General had 60 days from May 12, 1972, in which to respond to the submission.

17. July 11, 1972, was the sixtieth calendar day after May 12, 1972.

18. The United States Attorney General did not, on or before July 11, 1972, interpose an objection to the enforcement of Section 2 of Act 1205 of 1972.

19. Pursuant to 42 U. S. C. § 1973c, Section 2 of Act 1205 of 1972 may be enforced by the State of South Carolina and the Defendants, because Act 1205 has been submitted to the United States Attorney General and he has not interposed an objection to Section 2 of Act 1205 within 60 days after such submission.

As A Third Defense

20. Defendants reallege and incorporate in this defense, as if fully set out herein, the allegations of Paragraphs 1 through 19 above.

21. In the case of *McCollum, et al. v. West, etc., et al.*, Civil Action No. 71-1211, Plan A of Act 1205 of 1972 was considered and approved by a three-judge panel of this Court, acting within its lawful jurisdiction, on May 23, 1972, the Court finding specifically that Plan A "complies with the requirements of the Constitution of the United States, and it is therefore approved." The *McCollum* plaintiffs claimed that multimember districts and numbered seats for the election of the South Carolina Senate had the effect of denying or abridging the right of qualified black citizens to vote on account of their race, a claim that was decided adversely to the *McCollum* plaintiffs by this Court.

22. 42 U. S. C. § 1973c neither requires nor permits the United States Attorney General to review a determination made by a United States District Court in the proper exercise of its statutory jurisdiction that a legislative reapportionment plan does not deny or abridge the right of qualified black citizens to vote on account of their race.

23. Pursuant to the determination of this Court in *McCollum v. West* that Plan A of Act 1205 complies with the requirements of the Constitution of the United States, the State of South Carolina and the Defendants may enforce Plan A of Act 1205.

WHEREFORE, having fully answered the Complaint herein, the Defendants, and each of them, pray the Court:

(1) To enter judgment declaring that the Defendants may lawfully continue to enforce Plan A of Act 1205 of 1972 and denying the Plaintiffs the relief sought in the Complaint; and

(2) To award the Defendants the costs of this action and reasonable attorneys' fees.

DANIEL R. McLEOD,
Attorney General,

TREVA G. ASHWORTH,
Assistant Attorney General,
P. O. Box 11549,
Columbia, S. C. 29211,

RANDALL T. BELL,
University of South Carolina,
Law Center,
Columbia, S. C. 29208,
Attorneys for the
Defendants.
By: /s/ DANIEL R. McLEOD

Columbia, South Carolina
November 28, 1975.

APPENDIX B

STIPULATIONS

Civil Action No. 75-1998

STIPULATIONS

The parties to the above captioned action hereby agree and stipulate as follows:

1. That on or before July 11, 1972, the only communication from the United States Attorney General to the State of South Carolina conveying a decision to object or not to object to Section 2 of Act 1205 of 1972 was a letter dated June 30, 1975, from David L. Norman, Assistant Attorney General, Civil Rights Division, United States Department of Justice to Daniel R. McLeod, Attorney General of South Carolina.

2. That on or about July 1, 1972, the State of South Carolina began implementing Plan A of Act 1205 of 1972 and that Plan A was the basis upon which primary and general elections for the South Carolina Senate were conducted in August, September and November of 1972.

3. That the State of South Carolina has continuously enforced Plan A of Act 1205 of 1972 from a date on or about July 1, 1972, until the present.

4. That the 1973, 1974 and 1975 regular sessions and the 1973 special session of the General Assembly of South Carolina and its 1976 regular session to date have all been conducted on the basis of the Senate apportionment in Plan A of Act 1205 of 1972.

5. That from July 1, 1972, until the filing of this action on November 7, 1975, neither the plaintiffs in this action nor any other citizen of South Carolina commenced any legal action seeking an injunction or other relief against the enforcement of Plan A of Act 1205 of 1972, either on the ground that the State of South Carolina had no authority to enforce Plan A under Section of the Voting Rights Act of 1965 or on any other grounds.

6. That the plaintiffs John Roy Harper II and Victoria DeLee in *Harper v. Kleindienst,* Civil Action No.

1607-72 (D. D. C. filed August 10, 1972) are the same persons as the plaintiffs John Roy Harper II and Victoria DeLee in *McCollum v. West,* Civil Action No. 71-1211 (D. S. C. filed December 7, 1971).

7. That on July 21, 1972, the plaintiffs in *McCollum v. West,* Civil Action No. 71-1211 (D. S. C. filed December 7, 1971) filed Notice of Appeal to the United States Supreme Court from the orders of May 23d, 1972, and June 9th, 1972, in that action; that on September 19, 1972, the aforesaid plaintiffs were granted an extension of time within which to docket the appeal by the United States Supreme Court; that the time within which to docket the appeal was extended to November 21, 1972, a date after the commencement of action in *Harper v. Kleindienst,* Civil Action No. 1607-72 (D. D. C. August 10, 1972); that the aforesaid plaintiffs did not perfect the appeal in *McCollum v. West.*

8. That the plaintiffs in *McCollum v. West,* Civil Action No. 71-1211 (D. S. C. filed December 7, 1971) purported to maintain a class action on behalf of, *inter alia,* black residents in Charleston County, South Carolina; that the plaintiffs in the instant action were then and are now black residents in Charleston County, South Carolina.

9. That the parties to the instant action stipulate to the introduction into the record in this action of the deposition of James H. Quackenbush, Jr., taken in the case of *Stevenson v. West,* Civil Action No. 72-45 (D. S. C. filed 1972).

10. That the South Carolina House of Representatives was reapportioned into single-member districts in 1974 following the objection of the United States Attorney General to implementation of a prior reapportionment plan contained in Act No. 836 of 1973; that on or about February 14, 1974, the United States Attorney General interposed objection to Act No. 836 of 1973; that on or about February 28, 1974, H2274, a bill reapportioning the House of Representatives into single-member districts was reported to the floor of the House by the House Judiciary Committee; that on or about March 12, 1974, H2274, as amended, passed the House of Representatives; that on or about April 10, 1974, H2274, as further amended passed the Senate; that on or about April 24, 1974, H2274, as further amended, was reported to the floors of both chambers by a joint free conference committee; that on or about April 24, 1974, the House ratified the joint free conference report; that on or about April 26, 1974, the Senate ratified the joint free conference report; that on or about April 26, 1974, H2274, as ratified, was signed into law by the Governor as Act No. 991 of 1974; that on or about April 26, 1974, Act No. 991 of 1974, was submitted to the United States Attorney General for review under Section 5 of the Voting Rights Act of 1965; that on or about June 21, 1974, the United States Attorney General notified the State of South Carolina that he would interpose no objection to Act No. 991 of 1974.

11. That on or about August 14, 1972, the State of South Carolina received notice of the order of August 11, 1972, of the United States District Court in *Harper v. Kleindienst,* Civil Action No. 1607-72 (D. D. C. filed August 10, 1972).

12. That the information contained in the first, second, third, seventh, eighth, and ninth paragraphs of an article entitled "Senate Plans Remap Suit," appearing on page one of *The State* newspaper, Columbia, South Carolina, on November 6, 1975, is substantially accurate.

13. That the parties to the instant action stipulate to the introduction into the record in this action of transcripts of the meetings of the Special Senate Reapportionment Committee held on June 3, July 29, August 11 and October 30, 1975.

/s/ ARMAND DERFNER
Attorney for Plaintiffs

/s/ RANDALL T. BELL
Attorney for Defendants

January 26, 1976.

APPENDIX C

LETTER OF JUNE 30, 1972, FROM DAVID L. NORMAN TO DANIEL R. McLEOD

June 30, 1972

Honorable Daniel R. McLeod
Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Dear General McLeod:

This is in reference to your submission of Acts 1204 and 1205 to the Attorney General pursuant to the provisions of Section 5 of the Voting Rights Act of 1965. Act 1205 provides for a new reapportionment plan for the State Senate and extends the numbered post requirement to all multi-member districts in the House of Representatives. Act 1204 provides for the use of numbered posts in all multi-member bodies in the state. Because some of the provisions are similar and you have sought expedited consideration of both submissions to meet election schedules, this letter deals with both statutes.

Senate Plan

Act 1205 was adopted on May 5, 1972 after the three-judge district court in *Twiggs, et al. v. West, et al.* (D. C., S. C., Nos. 71-1106, 71-1123, 71-1211) ruled that a prior senate reapportionment (Act 932) deviated from the one-man, one-vote principle and contained an impermissible residency requirement. In one of the cases consolidated in that proceeding, plaintiffs also invoked the court's jurisdiction under the Fifteenth Amendment, claiming that multi-member senate districts and the numbered seat requirement illegally diluted minority voting strength. In its opinion of April 7, 1972, the court considered and rejected these contentions. As you are also aware, on March 6, 1972, prior to the above opinion, we entered an objection to Act 932 which you had submitted under Section 5 of the Voting

Rights Act. The view expressed in our letter was that under existing precedents we were unable to conclude that the combination of multi-member districts, numbered posts and majority run-off would not dilute and abridge the voting strength of racial minorities. Senate reapportionment Plan A of Act 1205 was considered and approved by the three-judge court on May 23, 1972 with the court finding specifically that Plan A "complies with the requirements of the Constitution of the United States, and it is therefore approved."

Our only function under Section 5 of the Voting Rights Act is to review submitted acts for Fifteenth Amendment compliance as nearly as possible in the same manner that the District Court for the District of Columbia would had the act been presented there as the subject of a declaratory judgment action. Under this standard, we feel constrained to defer to the above determination of the three-judge District Court. The District Court unquestionably had jurisdiction to consider the issues presented to it under both the Fourteenth and Fifteenth Amendments, and it has specifically found Plan A to be constitutional. Parties who feel aggrieved by its decision have full right to seek appellate review. It would in our view not be appropriate to read the Voting Rights Act as requiring or permitting the Attorney General to review a determination made by a United States District Court in the proper exercise of its statutory jurisdiction. For this reason, we enter no objection to the implementation of Plan A of Act 1205.

Numbered Seats

Section 3 of Act 1205 and Act 1204 extend the requirement of running for numbered posts to all multi-member boards, commissions and other elective offices in the state, including the House of Representatives. In *Johnson v. West* (No. 72-680), the same three-judge court was requested to enjoin implementation of these acts until they had been submitted under Section 5 of the Voting Rights Act. On June 14, 1972, the court entered such an order and specifically found that these provisions had never been ruled upon by the court. Unlike the situation with respect

to the Senate reapportionment plan, we review these acts without any prior judicial determination of constitutional validity or invalidity and with the burden of proof being on the submitting authority to show that the acts do not have the proscribed racial effect.

We have previously reviewed with you the various legal precedents indicating that the use of numbered seats and majority run-off requirements in multi-member electoral jurisdictions may impermissibly dilute the voting strength of cognizable racial minorities. (See our letter of March 6, 1972.) The question is whether we can certify that South Carolina's extension of the numbered seat requirement to virtually every multi-member office in the state does not have the dilutive effect described in those authorities.

According to information you furnished in connection with this submission, in addition to the House of Representatives, these requirements would apply to most of the state's school boards, county councils and municipal governing bodies. Many of these electorates contain cognizable racial minorities and we are unable to conclude that the racially dilutive effect some courts have described would not be occasioned by the numbered seat requirement.

For the above reasons, we must enter an objection on behalf of the Attorney General to the implementation of Act 1204 and Section 3 of Act 1205. As the Voting Rights Act provides, you may seek approval of these statutes in the District Court for the District of Columbia notwithstanding this objection.

Sincerely,

/s/ DAVID L. NORMAN,
Assistant Attorney General,
Civil Rights Division.

APPENDIX D

LETTER OF JULY 20, 1973 FROM J. STANLEY POTTINGER TO DANIEL R. McLEOD

July 20, 1973

Honorable Daniel R. McLeod
Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Dear Mr. Attorney General:

This is in reference to Act No. 1205 reapportioning the South Carolina Senate districts which was originally submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, on May 9, 1972.

On June 30, 1972 we notified you that no objection would be interposed to the senate redistricting because the Attorney General was "constrained to defer" to a determination made on May 23, 1972 by the three-judge court in *Twiggs, et al. v. West, et al.* (D. S. C. Nos. 71-1106, 71-1123, 71-1211). The Attorney General's decision not to object was subsequently challenged in the District Court for the District of Columbia, *Harper, et al. v. Richardson, et al.* (C. A. No. 1607-72). On August 11, 1972 the District Court entered an order suspending the 60-day period within which the Attorney General may enter an objection to changes submitted to him pursuant to Section 5. On May 16, 1973 the Court ordered the matter "remanded to the Attorney General of the United States for a reasoned decision in accordance with his statutory responsibilities" and required him to report to the Court within 60 days. Notice of appeal to the Court of Appeals for the District of Columbia was filed. Stay applications were denied in the District Court on June 11, 1973 and in the Circuit Court on July 13, 1973.

On July 16, 1973, in response to the Court's order, the Attorney General filed a decision based on a reconsideration of Act No. 1205, again deferring to the decision of

the three-judge court in the *Twiggs* case. This opinion indicated that but for the decision in *Twiggs*, the Attorney General would have objected to the Senate plan. On July 19, the District Court ordered the Attorney General to consider the Senate plan "without regard to the decision of the Three Judge District Court in *Twiggs v. West*." Copies of the orders of the District Court and the Attorney General's decision of July 16, 1973 are enclosed for your information.

Pursuant to the Order of July 19, 1973 and for the reasons set forth in the Attorney General's decision of July 16, 1973 and in our March 6, 1972 letter objecting to Act 932, an earlier Senate plan, I am unable to conclude that Act No. 1205 does not have the effect of abridging voting rights on account of race. Therefore, on behalf of the Attorney General, I must interpose an objection to the implementation of the election procedure set forth in that statute.

Of course, as provided for by Section 5, you may institute an action in the District Court for the District of Columbia for a declaratory judgment that Act 1205 does not have the purpose and will not have the effect of abridging the right to vote on account of race, notwithstanding this objection.

Sincerely,

/s/ J. STANLEY POTTINGER,
Assistant Attorney General,
Civil Rights Division.

APPENDIX E

ORDER OF AUGUST 11, 1972, IN HARPER v. KLEINDIENST, CIV. A. NO. 1607-72 (D. D. C. 1972)

Civil Action No. 1607-72

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This cause came on to be heard upon the complaint, the plaintiffs' Motion for Interim Relief and Memorandum in support thereof, the amendment to such motion made by plaintiffs in open court, and oral arguments of counsel. Upon consideration thereof, the Court being advised in the premises, the Court makes the following findings and conclusions.

FINDINGS

1. By letter dated June 30, 1972, the Attorney General of the United States notified the State of South Carolina that no objection would be interposed with respect to Sections 1 and 2 of Act 1205 of the State of South Carolina.

2. The time within which the Attorney General may interpose an objection to such sections under Section 5 of the Voting Rights Act, 42 U. S. C. § 1973c has not expired.

CONCLUSIONS

1. The Court has jurisdiction over the subject matter of this action and the parties thereto.

2. Unless appropriate steps are taken to maintain, *pendente lite*, the authority under Section 5 of the Voting Rights Act of defendant Attorney General of the United States to object to Sections 1 and 2 of Act 1205: (1) the jurisdiction of this Court to order final relief and (2) the rights of the plaintiffs to exercise their right to vote as citizens and voters in South Carolina free from acts or practices which the State has failed to prove do not have the purpose or effect of denying or abridging rights to vote on account of race or color, may be impaired, and such impairment would constitute an irreparable injury to the plaintiffs.

3. No injury will be caused if the following interim relief is granted, *pendente lite.*

WHEREUPON, it is by the Court, this 11th day of August 1972,

ORDERED

1. Pursuant to 5 U. S. C. § 705, the time within the Attorney General may interpose an objection to Act 1205 of the State of South Carolina is hereby extended pending further order of Court, or a further decision by the Attorney General as to whether South Carolina Act 1205 does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, giving reasons therefor, and submission of such decision to this Court.

2. The defendants are directed to notify the State of South Carolina of the entry of this order.

3. Jurisdiction of this case is retained by this Court.

4. This order does not preclude the defendants from litigating any issue in these proceedings in due course.

/s/ JUNE L. GREEN,
U. S. District Judge.

Supreme Court, U. S.
FILED
JUN 11 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1583

FRANCES MORRIS, *et al.*,
Appellants,

v.

L. MARION GRESSETTE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of South Carolina

---

OPPOSITION TO MOTION TO AFFIRM

Of Counsel:

MAX O. TRUITT, JR.
TIMOTHY N. BLACK
WILLIAM T. LAKE
ELWYN C. LEE
WILMER, CUTLER & PICKERING

J. ROGER WOLLENBERG
1666 K Street, N.W.
Washington, D.C. 20006

FRANK EPSTEIN
RAY P. McCLAIN
EPSTEIN, McCLAIN & DERFNER

ARMAND DERFNER
123 Meeting Street
Charleston, S.C. 29402

WILLIAM E. CALDWELL
LAWYERS COMMITTEE FOR
CIVIL RIGHTS UNDER LAW

Attorneys for Appellants

June 11, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1583

FRANCES MORRIS, *et al.*,
Appellants,

v.

L. MARION GRESSETTE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of South Carolina

---

OPPOSITION TO MOTION TO AFFIRM

Appellees' Motion to Affirm studiously ignores a decisive issue. The dispositive facts are that the Attorney General of the United States, acting pursuant to the outstanding order of a federal court that tolled his time to object, has objected to the South Carolina Senate reapportionment plan under Section 5. The State has at all times conceded that the Senate plan is subject to Section 5's preclearance requirement. Having deliberately eschewed invoking its statutory right to seek preclearance from a three-judge District Court for the District of Columbia, the State is barred by the very terms of Section 5 from enforcing its uncleared enactment.

Appellees complain repeatedly that the Attorney General's objection was entered after the 60-day deadline prescribed for his action under Section 5. Motion to Affirm 5-6, 7, 10-11. They utterly ignore the fact that the objection was entered after judicial review and pursuant to judicial order. It is settled law that "[t]he initial requirement that an [agency] decision . . . be made within 60 days of the application, obviously does not preclude further consideration following remand by the court." *International Harvestor Co.* v. *Ruckelshaus*, 478 F.2d 615, 650 (D.C. Cir. 1973).

Appellees assert that the 60-day period had expired before the *Harper* suit was brought, apparently suggesting that the *Harper* court therefore lacked jurisdiction. Motion to Affirm 5-6, 10-11. That assertion is both factually wrong [1] and legally irrelevant:

> "Courts are empowered to rectify agency action erroneously taken or to compel agency action erroneously withheld, and continuing agency authority to act independently is not a jurisdictional prerequisite to such relief." [2]

A contrary rule would require that judicial review be sought during the period in which the agency itself must act and would permit an agency—by delaying action until the final day—to foreclose review entirely.

Moreover, in this case the matter was not left to these general principles. To eliminate any doubt about the court's power to grant later relief, appellants sought and

[1] Before the *Harper* district court issued its tolling order, it considered a contention that the 60-day period had already expired. *Harper* v. *Kleindienst*, 362 F. Supp. 742, 744-45, (D.D.C. 1973). Under the Attorney General's regulations, the period begins to run only after all requested information has been received. 28 C.F.R. §§ 51.3, 51.18 (1975).

[2] *Harper* v. *Levi*, 520 F.2d 53, 60 (D.C. Cir. 1975), *citing CAB* v. *Delta Air Lines*, 367 U.S. 316, 326-27 (1961) (footnotes omitted). *See* J.S. 14 n.10.

obtained an order from the district court in *Harper* expressly tolling the Attorney General's time to object. South Carolina was promptly notified of that order. *See* J.S. 8 n. 6, 9-10. The Attorney General entered his objection, reflecting his independent judgment, during the period as thus tolled. Under Section 5 that objection is timely and prevents the State's enforcement of its law, unless the State exercises its right to obtain judicial preclearance.

The effectiveness of the tolling order, which rendered the Attorney General's objection timely, did not depend on the correctness of the ultimate ruling in *Harper*. The *Harper* district court necessarily had the power to preserve its ability to grant relief while it considered the issues before it, and its order was effective unless and until set aside by an appellate court.[3] *United States* v. *United Mine Workers*, 330 U.S. 258, 289-95 (1947). This rule rests on the fundamental principle that an order of a federal court, though it may be erroneous or even jurisdictionally infirm, nonetheless has effect "whilst it remains unreversed." *McCormick* v. *Sullivant*, 23 U.S. (10 Wheat.) 192, 200 (1825).[4] Appellees cavalierly ignore this principle, just as they cavalierly disregard the requirements of Section 5.

Appellees' efforts to circumvent the operation of the Voting Rights Act are particularly unappealing in the present circumstances. Although appellees had full notice of the *Harper* proceedings, they stayed out of the

[3] The D.C. Circuit in *Harper* found it unnecessary to review the tolling order, because it held that further action by the Attorney General would be timely even without the order, under *International Harvester, supra*. *See* 520 F.2d at 60 n.53.

[4] *See also, Walker* v. *Birmingham*, 388 U.S. 307 (1967); *United States* v. *Shipp*, 203 U.S. 563, 573 (1906); *United States* v. *Hall*, 472 F.2d 261, 265 (5th Cir. 1972); *Board of Education* v. *AFSCME*, 401 F. Supp. 687, 689 (N.D. Ga. 1975); H. M. Hart & H. Wechsler, The Federal Courts and the Federal System 841-44 (2d ed. 1973).

litigation. Then, when notified of the Attorney General's objection to the South Carolina Senate reapportionment plan, appellees elected not to seek preclearance in the District Court for the District of Columbia as required by Section 5. Instead, they chose to defy the Voting Rights Act by enforcing the uncleared enactment. Such flouting of the law should not be countenanced.

Respectfully submitted,

Of Counsel:

MAX O. TRUITT, JR.
TIMOTHY N. BLACK
WILLIAM T. LAKE
ELWYN C. LEE
WILMER, CUTLER & PICKERING

FRANK EPSTEIN
RAY P. MCCLAIN
EPSTEIN, MCCLAIN & DERFNER

WILLIAM E. CALDWELL
LAWYERS COMMITTEE FOR
CIVIL RIGHTS UNDER LAW

J. ROGER WOLLENBERG
1666 K Street, N.W.
Washington, D.C. 20006

ARMAND DERFNER
123 Meeting Street
Charleston, S.C. 29402

Attorneys for Appellants

June 11, 1976

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BRIEF FOR APPELLANTS

Of Counsel:

MAX O. TRUITT, JR.
TIMOTHY N. BLACK
WILLIAM T. LAKE
MICHELE B. CORASH
ELWYN C. LEE
WILMER, CUTLER & PICKERING

J. ROGER WOLLENBERG
1666 K Street, N.W.
Washington, D.C. 20006

FRANK EPSTEIN
RAY P. McCLAIN
EPSTEIN, McCLAIN & DERFNER

ARMAND DERFNER
123 Meeting Street
Charleston, S.C. 29402

ROBERT A. MURPHY
WILLIAM E. CALDWELL
LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Attorneys for Appellants

January 27, 1977

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1583

FRANCES MORRIS, *et al.*,
Appellants,

v.

L. MARION GRESSETTE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of South Carolina

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BRIEF FOR APPELLANTS

This is an appeal from the decision of a three-judge United States District Court sitting in the District of South Carolina, which denied an injunction against the enforcement of a South Carolina legislative redistricting statute and dismissed appellants' complaint.

OPINION BELOW

The opinion of the United States District Court for the District of South Carolina, Charleston Division (Haynsworth and Russell, C.JJ., and Hemphill, D.J.),

is not yet reported. A copy of the opinion is appended to appellants' Jurisdictional Statement as Appendix A (J.S. App. 1a). The unreported opinion in the related case of *Twiggs* v. *West*, Civ. No. 71-1106 (D.S.C. Apr. 7, 1972), is appended thereto as Appendix B (J.S. App. 26a).

JURISDICTION

This action was brought under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, for declaratory and injunctive relief against the enforcement of an act of the South Carolina legislature reapportioning the State Senate. Jurisdiction in the district court was founded on 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1973c. The district court entered its judgment on March 12, 1976 and denied appellants' Motion to Alter or Amend Judgment on March 30, 1976. J.S. App. 50a. Appellants filed their notice of appeal in the district court on April 16, 1976. J.S. App. 51a. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1253 and 2101(b). *See Georgia* v. *United States*, 411 U.S. 526 (1973); *Perkins* v. *Matthews*, 400 U.S. 379 (1971); *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969).

STATUTES INVOLVED

Section 2 of Act 1205 of 1972, S.C. CODE § 30-4.4 ("Act 1205"), is set forth as Appendix E to the Jurisdictional Statement (J.S. App. 52a). Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, is set forth as Appendix F to the Jurisdictional Statement (J.S. App. 57a).

QUESTIONS PRESENTED

1. Whether the court below erred in declining to enjoin the enforcement of the South Carolina Senate reapportionment law pursuant to Section 5 of the Voting

Rights Act where the Attorney General had objected to the law and the State had not obtained preclearance from the District Court for the District of Columbia.

2. Whether a decision by the Attorney General that he is legally barred from making an independent determination of the validity of a state voting law submitted to him for clearance under Section 5 of the Voting Rights Act is subject to judicial review under the Administrative Procedure Act.[1]

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[1] In their Motion to Alter or Amend Judgment (App. 57) which was denied below, and in their Jurisdictional Statement, appellants raised the issue whether Act 1205 might be considered a court-ordered plan rather than one subject to Section 5 under this Court's recent decision in *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976). App. 59; J.S. 18-19 and n.15. Appellants argued that Act 1205 is not a court-ordered plan, but that if it were, it would be invalid under this Court's ruling that district courts considering reapportionment plans may not approve multi-member districts "absent particularly pressing features." *Chapman* v. *Meier*, 420 U.S. 1, 19 (1975); *see* J.S. 20-22.

Extended treatment of this question appears unnecessary here since South Carolina has conceded and the United States has agreed that Act 1205 requires preclearance under Section 5 and is not a court-ordered plan. The court below pointed out that "[i]t is conceded by all parties that the challenged legislation is within the coverage of the Voting Rights Act of 1965 and that compliance with Section 5 of the Act was a condition to the enforcement of such legislation." J.S. App. 2a. Appellees cite this quote with approval in their Motion To Affirm (Mot. to Aff. 18) and flatly state, after contrasting the facts of this case with those of *East Carroll Parish*, that Act 1205 "was an Act by the General Assembly of South Carolina acting with full legislative authority under the State Consitution." Mot. to Aff. 18 n.53. Similarly, the United States, in its amicus brief on jurisdiction in this Court (Brief of the United States as Amicus Curiae, November, 1976, hereinafter cited as "U.S. Juris. Br."), expressed its belief "that the plan is not a court-ordered plan within the meaning of *East Carroll*" (U.S. Juris. Br. 9-10 n.6) and could not be effective until cleared under Section 5. *Id.* The United States further stated that if this Court were to determine that Act 1205 is a court-ordered plan, the presumption against the use of multi-member districts would apply. *Id.*

STATEMENT OF THE CASE

This case involves an attempt by black South Carolina voters to enjoin the continued implementation of South Carolina's 1972 Senate reapportionment law, Act 1205 of 1972 ("Act 1205"), on the ground that the State has not obtained preclearance of the plan as required by Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c ("Section 5").[2]

Although the Attorney General had earlier objected to a predecessor statute which contained the same basic features as Act 1205, the Attorney General initially declined to object to Act 1205 when it was submitted to him under Section 5.[3] The ground for the Attorney General's nonobjection was that he felt "constrained to defer"[4] to an earlier decision of a South Carolina three-judge district court upholding Act 1205 against challenges under the Fourteenth and Fifteenth Amendments. The Attorney General's failure to object was reviewed by the District of Columbia federal courts, exercising jurisdiction under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"). Those courts held that the Attorney General had committed legal error in declining on the ground stated to object to Act 1205, and ordered him to reach a reasoned determination of his own. The Attorney General thereupon independently

[2] Under Section 5, covered jurisdictions such as South Carolina are prohibited from enforcing a change in a voting law or practice in effect on November 1, 1964 unless and until either the proposed change has been submitted to the Attorney General of the United States and he "has not interposed an objection within sixty days after submission," or a three-judge district court in the District of Columbia declares the change to be without discriminatory purpose or effect (J.S. App. 57a).

[3] Letter of June 30, 1972 from Assistant Attorney General David L. Norman to the Attorney General of South Carolina, Daniel R. McLeod, App. 47.

[4] *Id.*

reviewed Act 1205 and on July 20, 1973 advised the State that he was entering an objection.[5]

South Carolina chose not to adopt a new apportionment plan in response to the Attorney General's objection or to pursue its alternative Section 5 remedy of seeking preclearance from the District Court for the District of Columbia. Despite the lack of Section 5 clearance South Carolina announced that it would continue to implement Act 1205. The present action before a three-judge district court was then brought under Section 5 to enjoin the continued implementation of South Carolina's statute. The court below dismissed the complaint.

The Facts

A. *Act 932*

In 1971 South Carolina enacted Act 932, the precursor to Act 1205. Act 932 reapportioned the State Senate by creating many multi-member districts having significant minority concentrations of black voters. It required candidates in those districts to run for numbered posts. A preexisting South Carolina "run-off election" statute (S.C. Code § 23-496) prevented any candidate from winning a Senate primary election by less than a majority vote.

South Carolina submitted Act 932 to the Attorney General pursuant to Section 5, and he interposed an objection to the statute on March 6, 1972, on the ground that South Carolina had not met its burden of proving nondiscrimination. His letter of objection said that he was "unable to conclude . . . that the combination of multi-member districts, numbered posts, and a majority

[5] Letter of July 20, 1973 from Assistant Attorney General J. Stanley Pottinger to the Attorney General of South Carolina, Daniel R. McLeod, App. 51.

run-off requirement would not occasion an abridgment of minority voting rights in South Carolina."[6]

Meanwhile, two suits had been filed in 1971 before a three-judge United States District Court for the District of South Carolina, attacking Act 932 as violative of the Fourteenth Amendment under the one-man, one-vote rule; a third suit attacked the law under the Fifteenth Amendment and sought to enjoin its enforcement until and unless it should be precleared pursuant to Section 5.[7] The Attorney General advised the district court of his Section 5 objection to Act 932 and asked the court to enjoin the enforcement of it on that ground without reaching the constitutional issues. The district court, however, proceeded to decide the constitutional issues, holding that the Act violated the Fourteenth Amendment by creating large population disparities among districts, but also holding that the black plaintiffs had not carried the burden of proof on their Fifteenth Amendment claim. The court expressly declined to rule on the claims under Section 5, recognizing that it was without jurisdiction to do so:

> "[T]he District Court for the District of Columbia . . . is the proper forum for review under the terms of the Voting Rights Act of 1965. We shall accordingly not consider the claims of the plaintiff . . . under the Voting Rights Act, but shall confine our consideration to the claims of invalidity

[6] Letter of March 6, 1972 from Assistant Attorney General David L. Norman to the Attorney General of South Carolina, Daniel R. McLeod, App. 26.

[7] The first such case had been filed by the Attorney General of South Carolina, at the request of the South Carolina General Assembly, seeking judicial approval of the reapportionment under the Fourteenth Amendment. A second suit was filed the same day by a plaintiff whose counsel was a member of the General Assembly. At this point a number of black citizens filed a separate action in which they attacked Act 932 as invalid under the Fourteenth and Fifteenth Amendments and under the Voting Rights Act.

> under the Fourteenth and Fifteenth Amendments . . . ." *Twiggs* v. *West*, Civ. No. 71-1106 (D.S.C. Apr. 7, 1972). J.S. App. 26a, 30a.

The court gave the South Carolina legislature thirty days to enact another apportionment plan, failing which the court would draw up a plan itself. J.S. App. 45a, 48a.

B. *Act 1205*

On May 5, 1972, the legislature enacted Act 1205 (the statute involved here). It created alternative plans "A" and "B" for reapportionment of the State senatorial districts.[8] Plan A which was eventually implemented varied only slightly from Act 932: It reduced the population disparities, but aggravated the multi-member district structure cited in the Attorney General's objection to Act 932 by creating more multi-member districts. The State submitted the new act to the Attorney General under Section 5. Simultaneously, it transmitted a copy to the South Carolina district court, which, without according a hearing, entered an order *sua sponte* finding the Senate reapportionment in Act 1205 to be constitutional.[9]

By letter of June 30, 1972, the Attorney General declined to object to Section 2 of Act 1205, explaining that he would not exercise his own judgment under Section 5 but felt "constrained to defer to the . . . determination of the three-judge District Court" in *Twiggs* v. *West, supra.*[10]

[8] Section 2 of Act 1205 of 1972, S.C. CODE § 30-4.4., J.S. App. 52a.

[9] *Twiggs* v. *West*, Order of May 23, 1972 (D.S.C., Civ. No. 71-1106), *aff'd mem. sub nom. Powell* v. *West*, 413 U.S. 901 (1973). (The appeal was on behalf of a political party and raised no racial discrimination or Section 5 questions.)

[10] Letter of June 30, 1972 from Assistant Attorney General David L. Norman to the Attorney General of South Carolina, Daniel R. McLeod, App. 47, 48.

In the same letter the Attorney General did object to related legislative enactments: Section 3 of Act 1205 and Act 1204, which had been submitted while Act 1205 was pending before the Attorney General. Section 3 of Act 1205 provided for numbered seating in all existing multi-member districts of the State House of Representatives. Act 1204 provided for numbered seats in *all* multi-member elective districts in South Carolina. The reason given by the Attorney General for reaching a different result when such features were made applicable to the lower house of the legislature and to other offices was that "[u]nlike the situation with respect to the Senate reapportionment plan, we [the Attorney General's office] review these acts [Section 3 of 1205 and Act 1204] without any prior judicial determination of constitutional validity . . . and with the burden of proof being on the submitting authority." [11]

Black South Carolina voters then brought suit against the Attorney General on August 10, 1972 in the United States District Court for the District of Columbia. They sought a ruling that the Attorney General was required to make an independent determination of the validity of the Senate reapportionment under Section 5 without "deferring" to the three-judge district court for South Carolina. On August 11, 1972, the District Court for the District of Columbia (Green, J.) entered an interim order finding that the Attorney General's time for objecting to Act 1205 had not yet expired and extending his time to object pursuant to 5 U.S.C. § 705, in order to avoid any question as to the court's jurisdiction to

[11] *Id.* 49. The South Carolina House of Representatives, which was reapportioned in 1974 to include only single-member districts, now contains 13 blacks out of 124 members. In contrast, the Senate, which retains numbered posts and multi-member districts under Act 1205, continues to have no black members, although over 25% of the State's registered voters are black. *See* South Carolina Election Commission, Report for the Period Ending June 30, 1973, at 574 (1974).

grant the relief requested in the complaint.[12] By direction of the district court, South Carolina was notified of this order by the Attorney General on or about August 14, 1972.[13]

On cross motions for summary judgment, the District Court for the District of Columbia held that the Attorney General's refusal to exercise his Section 5 responsibilities was reviewable for legal error under the APA, 5 U.S.C. § 702, and that the Attorney General had wrongly "abdicated" those responsibilities by purporting to defer to a court decision that had expressly declined to pass on the Section 5 question. The district court ordered the Attorney General to make his own independent determination of the validity of Act 1205 under Section 5. *Harper* v. *Kleindienst*, 362 F. Supp. 742 (D.D.C. 1973).

The Attorney General thereafter reviewed Act 1205 under the standards of Section 5 and filed with the court on July 16, 1973 a memorandum containing his decision.[14] He concluded that

> "[W]e were and still are compelled to conclude that Act 1205 has a clear and substantial racial effect in contravention of the Fifteenth Amendment and its protections under Section 5 of the Voting Rights Act. Indeed, the reasons for finding a contravention of the Fifteenth Amendment in the first set of senate plans submitted (Act No. 932), as we did in our objection letter of March 6, 1972, are

[12] Order of August 11, 1972, *Harper* v. *Kleindienst*, C.A. No. 1607-72 (D.D.C. 1972), appended hereto as Appendix A.

[13] *See* Stipulations Par. 11, App. 55.

[14] *See* Memorandum of the United States in Response to the Court's Order of May 16, 1973 (filed July 16, 1973) in *Harper* v. *Kleindienst*, 362 F. Supp. 742 (D.D.C. 1973), appended hereto as Appendix B.

> also present upon reviewing the existing Act in question (Act No. 1205)" [15]

Nonetheless, in the second part of the memorandum the Attorney General reaffirmed his refusal to object to Act 1205 on the ground that he was "constrained" to defer to the decision of the South Carolina District Court in *Twiggs* v. *West*.[16] On July 19, 1973, the district court issued a further order reciting that the Attorney General had "represented in open court that if the Attorney General considered Act 1205 without regard to the decision of the three-judge district court in *Twiggs* v. *West* he would enter an objection to such Act," and directing the Attorney General to perform such an independent review. On July 20, 1973 the Attorney General advised South Carolina of his objection to Act 1205, citing the "reasons set forth in the Attorney General's decision of July 16, 1973 and in our March 6, 1972 letter objecting to Act 932." [17]

On appeal to the United States Court of Appeals for the District of Columbia Circuit, the Attorney General challenged, *inter alia*, the reviewability of his determination under Section 5 as to Act 1205 and asserted the right and duty to defer, in making that determination, to the decision of the three-judge district court in South Carolina as to the constitutional validity of the Act.

The court of appeals (per Judge Robinson) affirmed the judgment of the district court (Judge MacKinnon dissenting as to the reviewability issue only), holding that the refusal of the Attorney General to exercise his own judgment pursuant to Section 5 was an error of law properly correctible on review under the APA. *Harper*

[15] *Id.* at 6, Appendix B attached hereto at 8a.

[16] *Id.* at 7, Appendix B attached hereto at 8a.

[17] Letter of July 20, 1973 from Assistant Attorney General J. Stanley Pottinger to the Attorney General of South Carolina, Daniel R. McLeod, App. 51, 52.

v. *Levi*, 520 F.2d 53, 69 (D.C. Cir. 1975). Certiorari was not sought by the Attorney General.

C. *South Carolina's Actions*

As noted, South Carolina submitted Act 1205, like its predecessor Act 932, to the Attorney General for preclearance under Section 5. While the Attorney General initially stated that he would not object to Act 1205, the Attorney General formally notified South Carolina of the court's August 11, 1972 order extending the Attorney General's time to object. *See* note 13 *supra*. South Carolina never sought relief from that order. Nor, since the State was notified on July 20, 1973 of the Attorney General's objection to Act 1205, has the State sought preclearance by the alternate statutory route of a declaratory judgment action in a three-judge District of Columbia federal district court. Indeed, the South Carolina State Senate caucused and decided on November 5, 1975 to continue enforcing Act 1205 despite the Attorney General's objection.[18]

D. *The Proceedings Below*

On November 7, 1975 appellants filed this suit, seeking declaratory and injunctive relief against the enforcement of Act 1205 in the then upcoming 1976 Senate elections. The United States, appearing as amicus curiae, acknowledged the correctness of the *Harper* determination that the Attorney General was obligated to reach his own independent judgment on Act 1205. And the United States urged the district court to give full effect to the Attorney General's objection to Act 1205 reflecting that independent judgment.[19] The United States also sug-

[18] *Senate Plans Remap Suit*, The State (Columbia, South Carolina), November 6, 1975, at 1; *see* Stipulations, Par. 12, App. 55.

[19] Amicus Memorandum of the United States, filed Jan. 28, 1976 in the court below. The United States noted that, under *Connor* v.

gested that *Connor* v. *Waller*, 421 U.S. 656 (1975), and *Chapman* v. *Meier*, 420 U.S. 1 (1975), counseled imposition of a single-member plan should it become necessary for the district court to fashion an interim plan for the 1976 Senate elections.

After a hearing, the three-judge district court denied the requested relief and dismissed the complaint on March 12, 1976. The court held that it need not follow the District of Columbia Circuit's decision in *Harper* v. *Levi*, because the State had not been a party to the prior suit. It further held that the District of Columbia courts had erred in holding that the Attorney General's initial refusal to make his own determination of the validity of Act 1205 was reviewable. Although it did not dispute the *Harper* district court's authority to extend the deadline for the Attorney General's objection, the court below held that the objection made in response to *Harper* had no effect and that South Carolina is free to enforce Act 1205.

On March 22, 1976, in order to insure a complete disposition of all issues pertaining to Act 1205 in this proceeding, appellants moved to alter or amend the judgment, apprising the district court of the possible bearing of this Court's decision in *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976). Appellants simultaneously requested an injunction pending appeal. The district court on March 30, 1976 denied these motions without opinion.

This appeal followed. On April 28, 1976 appellants filed their Jurisdictional Statement with this Court.

Waller, 421 U.S. 656 (1975), the Attorney General and the District Court for the District of Columbia have exclusive jurisdiction over laws covered by Section 5, and other district courts are precluded from ruling on constitutional challenges based on racial discrimination until preclearance has been obtained. The United States reiterated this position in its Amicus Brief in this Court, filed in November 1976. *See* U.S. Juris. Br. 8 n.4, 12.

Thereafter, on May 7, 1976, appellants applied to the Chief Justice for an injunction pending appeal; this request was denied on May 12, 1976. In response to this Court's invitation for an expression of the views of the United States, a brief amicus curiae in support of the statement as to jurisdiction was filed by the United States. Probable jurisdiction was noted on December 6, 1976.

SUMMARY OF ARGUMENT

I

The South Carolina Senate reapportionment plan (Act 1205) could validly be given effect only if precleared under Section 5 of the Voting Rights Act. The Attorney General having objected, and no clearance having been sought from the District of Columbia District Court, continued enforcement of Act 1205 should have been enjoined by the court below. South Carolina's failure to participate in the judicial review proceedings in *Harper* which resulted in the Attorney General's objection does not free South Carolina from the obligation to comply with the Voting Rights Act.

The court below erred in holding the Attorney General's objection untimely. That objection was entered after the District of Columbia District Court had lawfully extended the 60-day period provided by Section 5 for the entry of such objections. The validity of the district court's interim extension order does not turn on the reviewability of the Attorney General's action, since courts may grant interim relief while determining their basic jurisdiction and such interim relief would not be invalidated by a subsequent determination of a lack of basic jurisdiction. *United States* v. *United Mine Workers*, 330 U.S. 258 (1947).

II

Quite apart from the district court's interim extension order, the Attorney General's objection to Act 1205 was timely because it was made in response to judicial orders

in a lawful review proceeding. *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973). The Attorney General's determination that he was legally barred from exercising an independent judgment as to the validity of Act 1205 under Section 5 of the Voting Rights Act was judicially reviewable pursuant to the Administrative Procedure Act. Such a determination is not within any of the exceptions to the presumption of review created by the APA. The Voting Rights Act does not in terms bar review of Section 5 determinations (as it does in the case of census determinations under Section 4). Determinations of the Attorney General under Section 5 are not committed to his discretion but involve the quasi-judicial function of applying established legal standards to facts presented. And other remedies at law are wholly inadequate; indeed it was their inadequacy that led Congress to fashion the Section 5 preclearance procedures. To deny review of purely legal determinations of the Attorney General under Section 5 would permit a legal error of the Attorney General to nullify the protections afforded by Section 5.

III

Appropriate relief is required to prevent continuation of the uncleared Senate apportionment plan until the next regularly scheduled Senate elections in 1980. Unless South Carolina promptly obtains Section 5 clearance of a Senate apportionment plan, the district court should impose a valid plan. The relief granted should be tailored to insure a properly constituted State Senate by no later than 1978.

ARGUMENT

I. The Implementation of Act 1205 Violates Section 5 of the Voting Rights Act and Should Have Been Enjoined by the Court Below.

The position of appellants herein is neither novel nor complex. What is involved is a plain violation by South Carolina of Section 5 of the Voting Rights Act—a violation which appellants seek to remedy through the issuance of an injunction against the continued unlawful implementation of Act 1205. There is no dispute, as the court below held, "that the challenged legislation is within the coverage of the Voting Rights Act of 1965 and that compliance with Section 5 of that Act was a condition to the enforcement of such legislation." J.S. App. 2a. Section 5 prohibits the implementation of such legislation unless the covered jurisdiction obtains clearance from the Attorney General or obtains a declaratory judgment from a three-judge United States District Court for the District of Columbia that such legislation is not discriminatory in purpose or effect.

This appeal is the culmination of a proceeding which began when South Carolina decided to follow the first of these clearance routes and submitted Act 1205 to the Attorney General for clearance. The District Court for the District of Columbia thereafter extended the period for action by the Attorney General under Section 5. Since the Attorney General objected to Act 1205 within such extended period, South Carolina is barred by the Act from effectuating that legislation unless it can obtain the necessary declaratory judgment from the District Court for the District of Columbia.

South Carolina's position in this proceeding and the holding of the court below rest on the essential premise that the objection by the Attorney General to Act 1205 was of no effect. In order to reach this result, it is necessary to treat as nugatory the actions of the District Court for the District of Columbia. *See* pp. 8-9 *supra*. It is clear, however, that the actions of the District of Columbia federal courts cannot be disregarded. And this is so regardless of whether the District of Columbia courts were correct in concluding that they had authority under the APA to review the Attorney General's refusal to make an independent determination as to Act 1205. Those courts had, in any event, authority to suspend the

60-day objection period while determining their own jurisdiction.[20]

As this Court has held in a similar context, "the District Court had the power to preserve existing conditions while it was determining its own authority" to grant the relief requested; and the exercise of this power is effective to determine status and rights even if a reviewing court should later conclude that the lower court erred in its ultimate conclusion as to its jurisdiction to grant relief on the merits. *United States* v. *United Mine Workers*, 330 U.S. 258, 293 (1947). In *United Mine Workers*, a federal district court found a union and its president guilty of criminal and civil contempt for violation of a temporary restraining order which, the defendants argued, the court had no jurisdiction to issue. Upholding the contempt convictions, this Court ruled:

> "Pending a decision on a doubtful question of jurisdiction, the District Court [in an earlier case] was held to have power to maintain the *status quo* and punish violations as contempt.
>
> "In the case before us, the District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief." *Id.* at 292-93 (footnote omitted).

Thus, whether or not this Court should ultimately conclude that the District of Columbia federal courts had

[20] Although the district court in *Harper* explicitly found that the 60-day period had not run at the time its interim suspension order was entered (Appendix A attached hereto; *Harper*, 362 F. Supp. at 744-45), the court below found to the contrary, without explanation and without referring to the *Harper* finding. (J.S. App. 3a). We believe the *Harper* court's finding was correct; in any event, however, the effectiveness of its suspension order did not depend on whether the 60-day period had run. *See, e.g.*, Section 10(d) of the APA, 5 U.S.C. § 705, which confers authority to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."

jurisdiction under the APA, those courts plainly had the authority to grant interim relief preventing effectuation of the challenged action while the jurisdictional question was being determined. The district court duly exercised that authority by suspending the Section 5 60-day period in a proceeding to which the officer with statutory responsibility for acting under that section (the Attorney General) was a party.[21] And during such suspension the Attorney General objected to Act 1205. The only clearance sought by South Carolina under Section 5 having been timely denied by the Attorney General, it necessarily follows that South Carolina is without authority to enforce the statute.

South Carolina has taken the position—with which the court below agreed—that the Attorney General's objection is irrelevant on the ground that South Carolina was not "bound" by the actions of the District of Columbia courts in *Harper*. J.S. App. 5a. That position is erroneous in two respects.

First, inherent in the structure of the Voting Rights Act is the consequence that once South Carolina chose to submit legislation to the Attorney General for clearance, his action (whether objection or clearance by non-objection) will affect not only the State, but also the voting rights of every present and future voter in the State, regardless of whether those persons are formal parties to the proceeding under Section 5 instituted by the submission to the Attorney General or subsequent review thereof. It would be an absurdity to suggest that all whose interests are directly involved and may be affected must be formal parties to a submission to the

[21] This Court has recognized that statutory time periods are not inflexible and may be extended when required by applicable legal or equitable principles. *E.g.*, *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974); *Burnett* v. *New York Central*, 380 U.S. 424 (1965); *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231 (1959); *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946).

Attorney General or to proceedings to review his actions thereon. Thus, while it is arguable that neither South Carolina nor its voters (black or white) are directly "bound" by the *Harper* judgment as such, all are "bound" by Section 5 of the Voting Rights Act and their interests were necessarily affected by an operative event thereunder—the Attorney General's objection to Act 1205 —which precluded enforcement of the Senate apportionment plan unless judicial preclearance were obtained.

Second, South Carolina's claim to be treated as a stranger to the judicial review proceedings in *Harper* to review the Attorney General's initial decision not to object to Act 1205 must be viewed in light of the facts. It was South Carolina which initiated the legal proceedings by selecting, as the forum for Section 5 review of its legislation, clearance from the Attorney General rather than a declaratory judgment from a three-judge District Court for the District of Columbia.[22] It received, from the Attorney General, notice both of the district court's order suspending the Section 5 60-day period [23] and of the Attorney General's objection to Act 1205, including notice that the objection was being entered pursuant to the order of the District of Columbia District Court that he make an independent determination. The State had a continuing opportunity to intervene at every stage of the judicial proceedings,[24] or to seek clearance of its legislation through the alternative Section 5 route of a declaratory judgment by a three-judge District Court for the District of Columbia.

If South Carolina is in any sense a nonparty, it is entirely as a result of a tactical decision on its part that, by refraining from appearing in *Harper*, it would be able to ignore the objection to Act 1205 which was likely to result once the Attorney General performed his statutory mandate. This is the sort of evasive tactic which Congress found to be commonly used to deny minorities their voting rights, and which the Act was designed to defeat:

> "The previous legislation has proved ineffective for a number of reasons. Voting suits are unusually onerous to prepare. . . . Litigation has been exceedingly slow. . . . Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees. . . . Alternatively, certain local officials have defied and evaded court orders . . . ." *South Carolina* v. *Katzenbach*, 301 U.S. at 314 (footnote omitted).

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[22] *Cf. James Talcott, Inc.* v. *Allahabad Bank, Ltd.*, 444 F.2d 451, 462 (5th Cir. 1971).

> "If the party against whom the prior judgment is asserted did have the initiative in the prior suit, however, in the sense that he instigated the suit, there would appear to be *no reason* to assume that he did not have a full and fair opportunity to litigate. Thus, there is no reason to assume that he lacked sufficient *motive* to litigate when it was he himself who commenced the litigation. Similarly, it would be anomalous to consider the fairness of his forum when it was he himself who chose the forum. In short, a party who instigated the prior suit is in a poor position to complain about the adequacy of his *opportunity* to litigate in that suit."

[23] Stipulations, Par. 11, App. 55.

[24] *McKinney* v. *Alabama*, 424 U.S. 669, 676 (1976). *See also Penn-Central Merger Cases*, 389 U.S. 486, 505 (1968); *U.A.W., Local 283* v. *Scofield*, 382 U.S. 205, 212-13 (1965); *Nuesse* v. *Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967); *Red River Broadcasting Co.* v. *FCC*, 98 F.2d 282, 286 (D.C. Cir.), *cert. denied*, 305 U.S. 625 (1938):

> ". . . Such a person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated. To permit such a person to stand aside and speculate on the outcome; if adversely affected, come into this court for relief; and then permit the whole matter to be reopened in his behalf, would create an impossible situation."

> "The judicial process affords those who are determined to resist plentiful opportunity to resist. Indeed, even after apparent defeat resisters seek new ways and means of discriminating. Barring one contrivance too often caused no change in result, only in methods." H.R. Rep. No. 439, 89th Cong., 1st Sess. 9-10 (1965).

In sum, under the principles reviewed above, the election of South Carolina not to participate in *Harper* could not be dispositive. The South Carolina voting changes may not be implemented unless and until they have been cleared under one of the two methods provided by Section 5. The State's efforts to obtain clearance from the Attorney General were ineffectual because the 60-day objection period was lawfully extended and, during such extended period, the Attorney General entered an objection. South Carolina is accordingly precluded under Section 5 from enforcing Act 1205 unless and until it seeks and receives a determination by a three-judge District Court for the District of Columbia that Act 1205 is not discriminatory in purpose or effect.

II. The Decision of the Attorney General Not to Make an Independent Determination Under Section 5 Was Reviewable.

The court below, having concluded that appellees were not bound by the determinations of the District of Columbia federal courts in *Harper*, proceeded to reexamine the question of reviewability of the Attorney General's action and concluded that the District of Columbia courts had wrongly decided that issue. J.S. App. 13a-25a. We have demonstrated in Point I above that the effectiveness of the Attorney General's objection under Section 5 does not turn on the correctness of the holding of the District of Columbia courts in *Harper* on reviewability. In any event, as we show below, and as the United States now agrees, the Attorney General's objection was likewise timely because the *Harper* courts were correct in

ruling that they had power under the APA to review the Attorney General's failure to review Act 1205 under the standards of Section 5 and to require him to discharge that duty.[25]

The APA establishes a presumption in favor of judicial review of all agency actions,[26] except "to the extent that" review is precluded by statute, or agency action is "committed to agency discretion by law." APA § 10, 5 U.S.C. § 701(a). The right of review created by the APA extends to all final agency actions for which there is "no other adequate remedy in a court." *Id.* § 10(c), 5 U.S.C. § 704.

Under these statutory provisions and applicable judicial authorities, the Attorney General's decision that he was legally barred from making an independent determination of the validity of Act 1205 was clearly not immune from judicial review.[27]

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[25] U.S. Juris. Br. 15. There can no longer be any doubt as to the correctness of the ruling in *Harper* that the Attorney General had committed legal error in refusing to make an independent judgment as to Act 1205 and deferring to the District Court for South Carolina. The Attorney General now agrees that he may not under Section 5 substitute the ruling of a court for his independent judgment. As the Attorney General noted, that position was confirmed by this Court's decision in *Connor* v. *Waller*, 421 U.S. 656 (1975). The Court there ruled that a district court may not even entertain a constitutional challenge to legislation subject to the Voting Rights Act unless that legislation has first been cleared under Section 5. *See* U.S. Juris. Br. 9, and 8-9 n. 4.

[26] " 'Agency Action' includes the whole or part of an agency rule . . . or failure to act." 5 U.S.C. § 551(13). *See Chicago* v. *United States*, 396 U.S. 162 (1969).

[27] If review jurisdiction existed, the District of Columbia courts also had all necessary power to grant an effective remedy after performing their review function, and were not limited in this regard by the statutory 60-day period under Section 5 (even apart from the district court's earlier interim tolling order). It is well established that courts exercising their authority to review agency action are not constrained in granting ultimate relief by statutory time limits on the agency action under review. *CAB* v. *Delta Airlines*, 367

A. *The Voting Rights Act Does Not Preclude Judicial Review.*

Nothing in the Voting Rights Act or its legislative history overcomes the presumption in favor of reviewability created by the APA.[28] In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), this Court put to rest any argument that Congress' failure to include an express review provision in a particular statute evidences an intent to preclude review that would exempt action under the statute from APA review: "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Id.* at 140. *See also Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 157 (1970).

Last year, this Court reaffirmed the presumption of reviewability in *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). There, a union member sought review of the Secretary of Labor's decision not to sue to challenge an election under § 402(b) of the Labor-Management Reporting and Disclosure Act (Landrum-Griffin), 29 U.S.C. § 482(b) (1970). The statute creates no right of review and, since it involves a decision whether or not to bring a lawsuit, would seem to authorize the broadest type of

U.S. 316, 326-27 (1961); *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973). That principle was reaffirmed in *Bachowski* v. *Brennan*, 502 F.2d 79, 85-86 (3d Cir. 1974), *rev'd on other grounds sub nom. Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), where a 60-day time limit for agency action was held not to bar judicially ordered relief outside the 60-day period.

[28] Congress was aware of the ruling in *Harper* v. *Levi* when it extended the Voting Rights Act in 1975. Indeed, the decision was referred to in the Senate committee report and was praised on the House floor by the floor manager of the extending legislation. *See* S. Rep. No. 295, 94th Cong., 1st Sess. 18 (1975); 121 Cong. Rec. H7631 (daily ed. July 28, 1975).

discretion. Nonetheless, the Supreme Court held flatly that the Secretary's decision was subject to judicial review:

> "In the absence of an express prohibition in LMRDA, the Secretary, therefore, bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision. 'The question is phrased in terms of "prohibition" rather than "authorization" because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). . . .
>
> . . . .
>
> "We therefore reject the Secretary's argument as without merit. He has failed to make a showing of 'clear and convincing evidence' that Congress meant to prohibit all judicial review of his decision." *Id.* at 567-68.[29]

The Voting Rights Act itself contains evidence that Congress considered the question of preclusion of judicial review and decided to foreclose review only of certain actions other than those under Section 5. Section 4(b) of the Act provides:

> "A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court. . . ." 42 U.S.C. § 1973b(b).

Thus, where Congress intended to withhold judicial review, it provided expressly to that effect.[30] Congress en-

[29] As here, the statute in *Dunlop* had a 60-day time period for agency action. *See* note 27 *supra*.

[30] Notwithstanding the language of Section 4(b), the Court of Appeals for the District of Columbia Circuit affirmed the

acted no such provision precluding review of Section 5 determinations.

Although the Voting Rights Act does not expressly preclude review of Section 5 determinations (unlike those under Section 4), the court below found in the mere fact that the Act gives the Attorney General a stated period in which to object "compelling reason" to believe Congress meant to exclude judicial review. As the United States has noted in its Amicus Brief, however, the statutory time limit was directed at assuring that covered jurisdictions would obtain prompt clearance of plainly nondiscriminatory legislation and does not place an absolute limitation on the period for reviewing voting law changes.[31] Indeed, the Attorney General's regulations recognize the permissibility of delay in difficult cases by providing that the 60-day period does not begin to run until the Attorney General has received any additional information he may request from the submitting authority. 28 C.F.R. § 51.18 (1976). This Court has upheld this provision of the regulations, rejecting the argument that the delay it sometimes entails violates the Act. *Georgia* v. *United States*, 411 U.S. 526, 539-41 (1973). Likewise, any delay resulting from judicial correction of legal error made by the Attorney General in declining to object to a racially significant voting change does not impede the overall application of Section 5. To the contrary, judicial clarification of the provisions of Section 5 has promoted, and will continue to promote, its effective application.

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authority of the District of Columbia federal district court to review certain determinations of the Director of the Census, holding that "even where the intent of Congress was to preclude judicial review, a limited jurisdiction exists in the court to review actions which on their face are plainly in excess of statutory authority." *Briscoe* v. *Levi*, 535 F.2d 1259, 1265 (D.C. Cir. 1976). This decision is presently before this Court, certiorari having been granted on December 6, 1976 (No. 76-60).

[31] U.S. Juris. Br. 17.

B. *The Action of the Attorney General Reviewed in* Harper *Was Not an Action Committed to Agency Discretion.*

Appellees argued in the court below that the absence of a statutorily defined standard is evidence of congressional intent to commit all determinations under Section 5 to the Attorney General's complete discretion and thus put them beyond the reach of judicial review under the APA.

That contention is foreclosed by decisions of this Court and by the Attorney General's own regulations. They establish that the Attorney General must base his decision on the same determination as would a three-judge District Court for the District of Columbia in a declaratory judgment action under Section 5. Whether rendered by the Attorney General or the special three-judge court, the decision required by Section 5 is a traditional adjudication—the application of established legal rules to a specific factual situation.

The APA's exception from judicial review for agency action "committed to agency discretion" is "a very narrow exception." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971). It is "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.*, *quoting* S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). It cannot be argued that there is "no law to apply" to the Attorney General's decisions under Section 5. To the contrary, both the substantive standard and the burden of proof are precisely defined by the statute and regulations. In upholding the Attorney General's regulations, this Court has observed that the Attorney General does not interpret "the statute to grant him unfettered discretion" but instead those regulations require

him to follow "objective ground rules."[32] *Georgia* v. *United States*, 411 U.S. at 536. The Court approved the Attorney General's adoption of the same substantive standard and burden of proof that would apply in a declaratory judgment action, noting that "[a]ny less stringent standard might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered states a far smoother path to clearance." *Id.* at 538. *See also Perkins* v. *Matthews*, 400 U.S. 379, 385 (1971).

Appellees' arguments as to the purported discretionary nature of the Attorney General's Section 5 determinations might be of relevance if the Attorney General's factual determinations or his independent judgment on the merits had been challenged in *Harper*. But the *Harper* court was asked to make a legal, not a factual determination. *Harper* involved the Attorney General's failure to perform a statutory duty to make an independent judgment; the correctness of any independent judgment was not at issue.[33]

[32] The Attorney General's regulations make clear that he reads Section 5 to require him to make determinations that are nondiscretionary. They provide in part:

> "Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U.S. District Court for the District of Columbia, *imposes on the Attorney General what is essentially a judicial function*. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, *he will not object to the change* and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, *he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection* and so notify the submitting authority." 28 C.F.R. § 51.19 (1976) (emphasis added).

The challenge in *Harper* was strikingly similar to that which this Court considered in *Georgia*, *supra*. There, the United States had sued to enjoin the implementation of a Georgia voting change to which the Attorney General had objected. The objection was claimed by the state to be invalid because, applying his regulations, the Attorney General had based his determination on the state's failure to sustain its burden of proof, rather than on a finding that the voting change in fact had a discriminatory purpose or effect. If the Attorney General's decisions were unreviewable, the Court could not have entertained that contention. However, the Court reviewed and upheld the Attorney General's objection, ruling that the placement of the burden upon the state was permitted, if not required, by the Act, and that the Attorney General's letter of objection had "notified the state with sufficient clarity" of the basis for the objection. The Court concluded: "[W]e hold that his objection pursuant to that standard [allocating the burden of proof] was lawful and effective." 411 U.S. at 538-39. Thus in *Georgia*, as in *Harper*, the lawfulness of the Attorney General's action under Section 5 was judicially reviewed.[34]

[33] The *Harper* action was thus in the nature of mandamus under 28 U.S.C. § 1361. *Accord*, U.S. Juris. Br. 15.

The Attorney General has made clear that his independent judgment was and is that Act 1205 violates the substantive standards under the Voting Rights Act. The sole basis for his nonobjection was his assumption—which the *Harper* court held erroneous, and which he has since repudiated—that he was "constrained" to "defer" to the *Twiggs* court's Fifteenth Amendment determination.

[34] The court below reasoned that to uphold review in this instance would require that the Attorney General always make " 'explicit the basis' and reasoning for that determination." J.S. App. 22a. But no such result is required for a review of the limited question of

In the light of the foregoing authorities, particularly this Court's decisions in *Georgia* and *Dunlop*, it is clear that the *Harper* court correctly held reviewable the Attorney General's decision that he was legally barred from making his own independent review of a voting change under Section 5.

C. *Plaintiffs Have No Other Adequate Remedy in the Courts.*

The court below also rested its judgment on the ground that, since appellants can challenge Act 1205 under the Fourteenth and Fifteenth Amendments, they have an adequate remedy in court for any error or wrongdoing of the Attorney General and are therefore precluded from APA review under 5 U.S.C. § 704. This view totally misconceives the purpose of Section 5 to end the century-long frustration, by some jurisdictions, of the Fifteenth Amendment's guarantees. *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). *See also Perkins* v. *Matthews*, 400 U.S. 379, 388-89 (1971); *Allen* v. *State Board of Elections*, 393 U.S. 544, 565-69 (1969).

In *Katzenbach* the Court summarized the history of litigation to implement the Fifteenth Amendment and recognized the shortcomings of that process as a means of achieving equal voting rights. *Id.* at 310-15. The Court observed there that "[e]ven when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration." [35] *Id.* at 314. "The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting. The heart of the Act is a complex scheme of stringent remedies . . . . Section 5 prescribes . . . the suspension of all new voting regulations pending review by federal authorities . . . ." *Id.* at 315-16 (footnotes omitted). The court below failed to recognize that Section 5 was prompted by the inadequacy of traditional constitutional litigation to eliminate barriers to equal voting rights.

In its Amicus Brief on jurisdiction, the United States has set forth some of the important effects of Section 5's new remedy:

> "This suspension and clearance procedure has five legally significant effects upon the rights of voters in covered jurisdictions. First, it frees them from the requirement of complying with changed elec-

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statutory interpretation involved here. In an analogous situation, the Seventh Circuit held reviewable the question of whether a Federal Trade Commissioner had misconstrued his statutory obligation when he voted to issue a complaint alleging a violation of the Robinson-Patman Act, 15 U.S.C. § 13(c), *Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155, 1159-60 (7th Cir. 1970). The Commissioner had issued a statement accompanying the complaint to the effect that he construed the Commission's enforcement obligation to be mandatory when it has reason to believe there has been a violation of the Robinson-Patman Act and that he had no discretion to consider the public interest. Although courts will not ordinarily review such prosecutorial decisions (and FTC commissioners do not ordinarily explain—except for what is needed to allege a violation of law—the basis for a prosecutorial decision), the district court ruled that the Commissioner *did* have discretion and remanded to the Commission. The Seventh Circuit held that since the question was "inherently a legal one and does not involve any factual determinations," the district court had properly granted review. The court below conceded that no factual review was involved in *Harper*. J.S. App. 22a n.28.

[35] "The Court of Appeals for the Fifth Circuit ordered the registrars of Forrest County, Mississippi, to give future Negro applicants the same assistance which white applicants had enjoyed in the past, and to register future Negro applicants despite errors which were not serious enough to disqualify white applicants in the past. The Mississippi Legislature promptly responded by requiring applicants to complete their registration forms without assistance or error, and by adding a good-morals and public-challenge provision to the registration laws. *United States* v. *Mississippi*, 229 F. Supp. 925, 996-997 (dissenting opinion)." *South Carolina* v. *Katzenbach*, 383 U.S. at 314 n.19.

tion laws or procedures until the changes are shown to have no racially discriminatory purpose or effect. Second, it interposes the federal government between the voter protected by the Fifteenth Amendment and the covered jurisdiction. Third, it imposes on the jurisdiction, not the citizen, the burden of initiating clearance proceedings. Fourth, it transfers the venue of such proceedings to the District of Columbia. Fifth, it places the burden of proving the absence of discriminatory purpose or effect upon the covered jurisdiction." U.S. Juris. Br. 12-13.

The opinion below would deprive appellants of every one of these benefits, permanently, and without remedy. The appellants' right to challenge existing voting laws under the Fourteenth or Fifteenth Amendments is irrelevant to the protection or enjoyment of these statutory benefits inasmuch as a constitutional challenge would neither protect these statutory rights during litigation nor subsequently restore them to successful plaintiffs.[36]

For these reasons the court below was also in error in ruling that the Attorney General's deferral did not

[36] Congress believes the Section 5 protections to be so critical to voting equality that it twice extended the duration of their effectiveness. In 1970 it did so because:

> "The committee is convinced that section 5 procedures are an integral part of the rights afforded by the 1965 act. Federal review of voting law changes insures that . . . the affected States and counties cannot, by employing changes in legislation undo or defeat the rights recently won by non-white voters. Section 5 . . . provides an important safeguard that new subterfuges will be promptly discovered and enjoined. Failure to continue this provision of the act would jettison a vital element of the enforcement machinery. It would reverse the burden of proof and restore time-consuming litigation as the principal means of assuring the equal right to vote." H.R. Rep. No. 397, 91st Cong., 1st Sess. 8 (1969).

In 1975 Congress recognized that reapportionment is a prime occasion for voting discrimination and described Section 5 as "the front line defense against voting discrimination." S. Rep. No. 295, 94th Cong., 1st Sess. 18 (1975). *See also* H. R. Rep. No. 196, 94th Cong., 1st Sess. 10-11 (1975).

finally affect any individual rights. The Court recognized in *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), that individuals have enforceable interests in Section 5 protections—protections which are permanently extinguished if Section 5 is not enforced. These protections are, the Court held, intended "to make the guarantees of the Fifteenth Amendment finally a reality for all citizens. . . . [Congress] realized that existing remedies were inadequate to accomplish this purpose." *Id.* at 556. The denial by the court below of the relief sought by appellants would again postpone this attainment of the Fifteenth Amendment guarantees.

III. Prompt Relief Should Be Granted to Afford an Effective Remedy Against South Carolina's Invalid Senate Apportionment.

If the judgment below is reversed, a new reapportionment of the South Carolina Senate will be necessary unless South Carolina elects to seek and promptly obtains a declaratory judgment clearing Act 1205. There would then arise the question of when the new plan should be implemented. This Court and lower courts have repeatedly recognized that irreparable injury to voters resulting from an invalid apportionment or from a violation of the Voting Rights Act should be ended at the earliest practicable date, and special elections have generally been ordered when the next regularly scheduled election is more than a year away. *Swann* v. *Adams*, 383 U.S. 210 (1966); *Hughes* v. *WMCA, Inc.*, 379 U.S. 694 (1965). Special mid-term elections are especially appropriate where relief has been seasonably sought before the beginning of the term of office which is to be abbreviated. *Hadnott* v. *Amos*, 394 U.S. 358 (1969); *Hamer* v. *Campbell*, 358 F.2d 215 (5th Cir.), *cert. denied*, 385 U.S. 851 (1966).

In this case all conditions are met for such relief. The full membership (46) of the South Carolina Senate is

elected for four-year terms. Injunctive relief was sought in both this Court and the court below, before the commencement of the current Senate term.[37] The current Senate was elected in November 1976 and its members would not ordinarily stand for election again until 1980. There is no reason, however, why relief should be delayed past November 1978. At that time, there will be statewide elections in South Carolina for the offices of governor, lieutenant governor, all 124 members of the State House of Representatives, one United States senator, and six United States representatives, and for many other state and local offices. Thus, holding special Senate elections at that time would result in no disruption of the election process nor any voter confusion.

Litigation over the South Carolina Senate reapportionment is now in its sixth year. Prompt and effective relief should therefore be ordered in order to give meaning to the guarantees of the Voting Rights Act and of the one-man one-vote requirement of the Constitution. To this end the district court should be instructed (absent prompt judicial clearance of Act 1205 under Section 5) to order special elections in 1978. Unless South Carolina can obtain Section 5 clearance of a new Senate apportionment plan in time for 1978 elections, those elections should be held under a plan devised by the court.

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[37] An injunction against the 1976 South Carolina Senate elections was denied by the lower court on March 30, 1976, and by the Chief Justice on May 12, 1976.

CONCLUSION

For the foregoing reasons the judgment below should be reversed with directions to enter judgment for plaintiffs and to provide appropriate relief to insure that South Carolina's Senate will be properly constituted by no later than 1978.

Respectfully submitted,

Of Counsel:

MAX O. TRUITT, JR.
TIMOTHY N. BLACK
WILLIAM T. LAKE
MICHELE B. CORASH
ELWYN C. LEE
WILMER, CUTLER & PICKERING

FRANK EPSTEIN
RAY P. McCLAIN
EPSTEIN, McCLAIN & DERFNER

ROBERT A. MURPHY
WILLIAM E. CALDWELL
LAWYERS COMMITTEE FOR
CIVIL RIGHTS UNDER LAW

J. ROGER WOLLENBERG
1666 K Street, N.W.
Washington, D.C. 20006

ARMAND DERFNER
123 Meeting Street
Charleston, S.C. 29402

Attorneys for Appellants

January 27, 1977

APPENDICES

APPENDIX A

Order of August 11, 1972, Harper v. Kleindienst, C.A. No. 1607-72 (D.D.C. 1972)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1607-72

JOY ROY HARPER, II,
Plaintiffs

vs.

RICHARD KLEINDIENST, *et al.*,
Defendants

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This cause came on to be heard upon the complaint, the plaintiffs' Motion for Interim Relief and Memorandum in support thereof, the amendment to such motion made by plaintiffs in open court, and oral arguments of counsel. Upon consideration thereof, the Court being advised in the premises, the Court makes the following findings and conclusions.

FINDINGS

1. By letter dated June 30, 1972, the Attorney General of the United States notified the State of South Carolina that no objection would be interposed with respect to Sections 1 and 2 of Act 1205 of the State of South Carolina.

2. The time within which the Attorney General may interpose an objection to such sections under Section 5

of the Voting Rights Act, 42 U.S.C. § 1973c has not expired.

CONCLUSIONS

1. The Court has jurisdiction over the subject matter of this action and the parties thereto.

2. Unless appropriate steps are taken to maintain, *pendente lite*, the authority under Section 5 of the Voting Rights Act of defendant Attorney General of the United States to object to Sections 1 and 2 of Act 1205: (1) the jurisdiction of this Court to order final relief and (2) the rights of the plaintiffs to exercise their right to vote as citizens and voters in South Carolina free from acts or practices which the State has failed to prove do not have the purpose or effect of denying or abridging rights to vote on account of race or color, may be impaired, and such impairment would constitute an irreparable injury to the plaintiffs.

3. No injury will be caused if the following interim relief is granted, *pendente lite*.

WHEREUPON, it is by the Court, this 11th day of August 1972,

ORDERED

1. Pursuant to 5 U.S.C. § 705, the time within the Attorney General may interpose an objection to Act 1205 of the State of South Carolina is hereby extended pending further order of Court, or a further decision by the Attorney General as to whether South Carolina Act 1205 does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, giving reasons therefor, and submission of such decision to this Court.

2. The defendants are directed to notify the State of South Carolina of the entry of this order.

3. Jurisdiction of this case is retained by this Court.

4. This order does not preclude the defendants from litigating any issue in these proceedings in due course.

/s/ JUNE L. GREEN
U. S. District Judge

APPENDIX B

Memorandum of the United States in Response to the Court's Order of May 16, 1973 (filed July 16, 1973), *Harper* v. *Kleindienst*, 362 F. Supp. 742 (D.D.C. 1973)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1607-72

JOHN ROY HARPER, *et al.*,
Plaintiffs,

v.

ELLIOT L. RICHARDSON, *et al.*,
Defendants.

MEMORANDUM OF THE UNITED STATES IN RESPONSE TO THE COURT'S ORDER OF MAY 16, 1973

This memorandum is submitted pursuant to the Memorandum Order of this Court dated May 16, 1973, requiring the Attorney General of the United States to provide a "reasoned decision" and to "report the same to the Court in writing within 60 days from the date hereof." In accordance with this directive, we have studied the Order and have again examined our files to determine whether the conclusion reached and reasons for that decision are sound. We conclude again that they were. In submitting the present memorandum, we reserve the right to contest the determination that the Attorney General's action under Section 5 is judicially reviewable.

The submission under Section 5 of the first reapportionment plan for the South Carolina Senate (Act No. 932) was completed on January 5, 1972. The enactment

provided for two complete sets of election districts[1] and requested that we consider Plan B if Plan A was determined to be unconstitutional. The boundary lines used in these plans were in most instances identical, and both used only combinations of counties which resulted in a large number of multi-member voting districts.[2] The reapportionment systems also required that in the districts electing two or more senators, the candidates would have to run for numbered posts. Under a separate South Carolina statute, a person cannot be elected unless he receives a majority of the votes cast.

After an objection to these districts was interposed by the Attorney General on March 6, 1972, the State passed new redistricting proposals (Act No. 1205) and submitted them to the Attorney General pursuant to the Voting Rights Act. Again, two plans (A and B) were submitted. These significantly increased the number of multi-member districts.[3] On May 23, 1972, before the Attorney General ruled on the acceptability of the submitted plan, a three judge federal court in South Carolina which was considering challenges to the senate reapportionment based on Fourteenth and Fifteenth Amendment grounds filed an opinion holding that Act No. 1205 met the requirements of both amendments.[4] Finding that he was compelled to defer to the federal court's decision,

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[1] Under either plan 46 Senators were to be elected.

[2] Twelve of the 23 senatorial districts in Plan A were multi-member, while 14 of the 20 Plan B districts elected more than one senator.

[3] Under Act No. 932, only 35 of the 46 senators were to be elected from multi-member districts. Plan A of Act No. 1205 called for 43 of the 46 senate members to be elected from such districts.

[4] *Twiggs* v. *West* F. Supp. (D.S.C. 1972). The same three-judge panel had ruled on April 7, 1972, after the Attorney General's objection to Act No. 932, that the first senate plans failed to meet the one person, one vote standards required by the Fourteenth Amendment.

the Attorney General notified the State on June 30, 1972 that he interposed no objection to the reapportionment.

I.

Voting rights guaranteed by the Fifteenth Amendment and specifically protected by Section 5 of the Voting Rights Act can be abridged, among other ways, by submerging black majority areas into heavily white districts which would if permitted to stand, result in a white majority. See *Allen* v. *Board of Elections*, 393 U.S. 544, 569 (1969). Census statistics and past discrimination against black voters lead the Attorney General to the conclusion that in South Carolina a dilution of black voting strength would result from the senate plans submitted.

An examination of the reason for this conclusion is in order. Each of the four proposals considered by this Department was designed to elect 46 senators. Therefore, the ideal population for a senatorial district under these plans would have been 56,713.[5] Demographic data in the Census reports reflect that a substantial number of the 790,000 blacks residing in South Carolina are concentrated in several areas so that single-member districting would have resulted in four or five election districts with black population majorities. Two counties, Charleston and Richland, have over 70,000 blacks residing in them,[6] and five other counties[7] contain over 30,000 black residents.

[5] This analysis is based on the 1970 Census which shows 2,590,516 persons living in South Carolina.

[6] There are 168,414 whites and 77,884 blacks in Charleston; 159,092 whites and 73,437 blacks in Richland.

[7] Florence, Greenville, Orangeburg, Spartanburg, and Sumter.

Moreover, by applying a numbered post requirement[8] the senate plans aggravated the possible discriminatory effect on minority voters which might have arisen from the use of multi-member districts. Where multi-member districts exist and "single-shot" voting is permitted,[9] it is possible for a person to be elected with less than a majority of the votes cast.[10] Of course, it becomes impossible to win by taking advantage of "single-shot voting" if there is also a majority requirement as there is in South Carolina.[11]

We recognize that under some circumstances multi-member voting districts will not lead to the dilution or abridgment of minority voting rights. Unconstitutional discrimination occurs only where there is a showing that the minority has been excluded from the political process. See *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). But recent decisions emphasize the principal [sic] that in circumstances where blacks have in the past been excluded or discriminated against in the political process, their voting strength cannot be minimized by using at-large

[8] Where more than one seat is to be filled from a single election district, the candidates must designate and run for a particular position, rather than permitting the top vote getters to win.

[9] In *Stevenson* v. *West* —— F. Supp. —— (D.S.C. 1972), a companion case of *Twiggs*, the court declared the South Carolina full-slate law unconstitutional.

[10] For example, if there are five seats to be filled with nine candidates running and 169 voters, a group of 30 persons could all cast their ballots for candidate A only. Then, assuming that there are four other candidates (B, C, D, E) who are strong vote getters and receive 70 ballots each and the remaining votes are spread relatively evenly over the remaining four candidates with F and G getting 20 votes each and H and I receiving 15 each, candidate A would be elected although he received only 30% of the votes cast.

[11] The Supreme Court has upheld an objection interposed in a similar case where the Attorney General found that the combination of multi-member districts, numbered posts and majority voting requirement resulted in a racially discriminatory effect on voting. *Georgia* v. *U.S.* 41 U.S.L.W. 4570 (May 7, 1973).

voting, *Petersburg* v. *United States*, —— F. Supp. —— (D.D.C. 1972) aff'd —— U.S. —— (1973), or by the use of multi-member election districts, *Graves* v. *Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972) aff'd *sub nom White* v. *Register*, 41 U.S.L.W. 4885 (1973);[12] *Sims* v. *Amos*, C.A. No. 1744-N (N.D. Ala.) (January 3, 1972).[13]

In South Carolina blacks have in the past been continually and consciously prevented from fully exercising the right to vote. See *e.g. Rice* v. *Elmore*, 72 F. Supp. 516 (D.S.C., 1947).

In view of these facts, we were and still are compelled to conclude that Act No. 1205 has a clear and substantial racial effect in contravention of the Fifteenth Amendment and its protections under Section 5 of the Voting Rights Act. Indeed, the reasons for finding a contravention of the Fifteenth Amendment in the first set of senate plans submitted (Act No. 932), as we did in our objection letter of March 6, 1972, are also present upon reviewing the existing Act in question (Act No. 1205).

II.

Notwithstanding our conclusion that Act No. 1205 has a discriminatory effect, we find that we are constrained by the constitutional doctrine of separation of powers and by commonly accepted principles of appeal and judicial review from interposing an objection to its implementation. In a word, the Attorney General of the United States does not have the authority to overrule a decision of a federal court.

That interposing an objection would constitute the overruling of a federal court can be seen by examining

[12] *White* also reversed the lower court's decision in part which is not relevant here.

[13] Also see *Taylor* v. *McKeithen* 407 U.S. 191 (1972), n. 3, and the preference for single member districts shown by the court in *Connor* v. *Johnson*, 402 U.S. 690, 692 (1971).

the circumstances before us. The senate reapportionment plans submitted to the Attorney General were properly before the federal district court in *Twiggs* v. *West*, *supra*, a point which is not in dispute. The question of whether the boundary lines of the plans constituted a violation of the Fifteenth Amendment was specifically raised and decided. This is the same question, viewed in light of the same Fifteenth Amendment, on which the Attorney General would rule under Section 5. Certainly it is well recognized and accepted that our constitutional system does not permit an agency of the executive branch of government to sit in review of a federal court decision. And least of all would such an action be appropriate when it would involve, as it would here, adjudicating essentially the same question in light of essentially the same law as was adjudicated by a federal court having undisputed jurisdiction to do so.

Thus, in *Connor* v. *Johnson*, 402 U.S. 690 (1971), the Court held unanimously that a state redistricting plan formulated and ordered by a federal court need not be approved by the Attorney General under Section 5. "A decree of the United States is not within the reach of Section 5 of the Voting Rights Act." at 691.[14]

Connor, of course, differs from the present case insofar as the voting plan there was formulated by the district court itself, while in South Carolina the plan was

[14] As Mr. Justice Black noted in his separate opinion in *Connor* (402 U.S. at 695):

> Under our constitutional system it would be strange indeed to construe § 5 of the Voting Rights Act of 1965, 79 Stat. 739, 42 U.S.C. § 1973c (1964 ed., Supp. V), to require that actions of a federal court be stayed and reviewed by the Attorney General or the United States District Court for the District of Columbia.

The Attorney General's deferral to judicial determination was also specifically noted by the Supreme Court in *Georgia* v. *United States*, 41 U.S.L.W. 4570, 4573 and n. 6 (1973).

formulated by the legislature. Since it might be argued that state-formulated plans are "suspect", while court-formulated plans are not, this difference would ordinarily have significance worth exploration. The difference is not significant here, however, since the South Carolina plan *was* examined by a federal court which reviewed the plan for conformity to the same Fifteenth Amendment standards which presumably would have governed the court if it had had the task of devising the plan itself.

It might also be argued that although the Fifteenth Amendment guides the courts and the Attorney General alike in voting rights cases, Section 5 and its scheme for decision-making are different enough from court adjudication of Fifteenth Amendment questions to provide the Attorney General with an independent basis for reviewing the same questions. Under the Voting Rights Act the submitting authority has the burden of showing that the change does not have a racially discriminatory purpose or effect, *Georgia* v. *United States*, *supra*, and must rely on the Attorney General's judgment. Yet these differences are not sufficient to furnish a basis for the Attorney General to enter an objection where it will have the effect of overturning a federal judicial decision on the merits of the Fifteenth Amendment question.[15] The same arguments would, of course, apply in *Connor*, but there the Court had no problem in finding Section 5 inapplicable.

Reliance on the proposition that Fifteenth Amendment and Section 5 cases are grounded on separate forums and burdens cannot alter the particular circumstances now before the Attorney General. Plaintiffs conferred Fifteenth Amendment jurisdiction on the Federal court

[15] Also, there is no indication here that the district court was in equipoise and decided the way it did merely because of the burden of proof.

in South Carolina and then proceeded to fully litigate their claims under it. Section 5 was not designed and does not provide the opportunity for them to contest the same questions before the Attorney General.

For the foregoing reasons, on behalf of the Attorney General, we conclude that the reapportionment plan for the South Carolina Senate (Act No. 1205) would ordinarily be objectionable under Section 5 of the Voting Rights Act, but that in light of a contrary finding by a federal court having undisputed jurisdiction over controlling Fifteenth Amendment questions of fact and law, we have no legitimate authority to interpose an overriding objection to the administration of that plan.

Respectfully submitted,

J. STANLEY POTTINGER
Assistant Attorney General

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1583

FRANCES MORRIS, ET AL., APPELLANTS,

versus

L. MARION GRESSETTE, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR APPELLEES

Of Counsel:
TREVA G. ASHWORTH,
KENNETH L. CHILDS,
KATHERINE W. HILL
Assistant Attorneys General.

JAMES P. FIELDS,
Senate Judiciary Committee,
South Carolina Senate.

DANIEL R. McLEOD,
Attorney General,
Post Office Box 11549,
Columbia, South Carolina 29211.

RANDALL T. BELL,
University of South Carolina,
School of Law,
Columbia, South Carolina 29208.
Attorneys for Appellees.

February 26, 1977.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1583

FRANCES MORRIS, et al., Appellants,

versus

L. MARION GRESSETTE, et al., Appellees.

On Appeal from the United States District Court for the District of South Carolina

---

BRIEF FOR APPELLEES

QUESTION PRESENTED

Whether the State of South Carolina, having made a proper submission of its 1972 Senate reapportionment plan to the United States Attorney General and having received no objection to the plan within sixty days after submission, is authorized under Section 5 of the Voting Rights Act of 1965 to enforce the plan?

STATEMENT OF THE CASE

This is a suit by appellants to enjoin enforcement of the South Carolina Senate reapportionment plan (hereinafter the "Senate Plan") enacted by the General Assembly of South Carolina in Act 1205 of 1972,[1] on the ground that it has not been precleared under Section 5 of the Voting Rights Act of 1965.[2]

Three days after the Senate Plan was signed into law, it was submitted to the Attorney General for review and preclearance under Section 5 of the Voting Rights Act. The submission was received by the Attorney General on May 12, 1972, and was considered by him to be complete under

[1] 57 STAT. 2384 (1972). Section 2 of Act 1205 contained two Senate reapportionment plans, Plan A and Plan B. Plan B was to take effect only if Plan A was declared invalid by the courts. It is Plan A that is the subject of this litigation. Section 3 of Act 1205 related to numbered seats in the House of Representatives. The Attorney General objected to Section 3 and it was never enforced.

[2] 42 U. S. C. § 1973c. The statute provides in pertinent part:

> Whenever a State . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . . such State . . . may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, . . . and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure, has been submitted by the chief legal officer or other appropriate official of such State . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. . . . Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

his own guidelines [3] as of that date.[4] The sixtieth calendar day after May 12, 1972, was July 11, 1972. On June 30, 1972, the Attorney General responded to the submission of the Senate Plan in a letter addressed to Daniel R. McLeod, the South Carolina Attorney General. In the letter the Attorney General stated that he interposed no objection to the Senate Plan.[5] It is conceded that, other than this letter of June 30th, the Attorney General conveyed no decision to the State of South Carolina either objecting or not objecting to the Senate Plan on or before July 11, 1972.[6]

Appellants rely on a subsequent objection to the Senate Plan interposed by the Attorney General on July 20, 1973,[7] pursuant to a court order in *Harper v. Kleindienst*,[8] to support their cause of action. The events leading to that objection begin in 1971.

Harper I

After the 1970 census figures were published in 1971, the General Assembly enacted Act 932 of 1971 [9] containing alternate plans for the reapportionment of the State Senate (hereinafter the "1971 Plans"). The 1971 Plans were promptly submitted to the Attorney General for preclearance pursuant to Section 5 of the Voting Rights Act and were received by him on November 22, 1971.[10] The Attorney

[3] 28 C. F. R. § 51 *et seq.*

[4] A. 33. See also Defendants Motion to Dismiss of October 16, 1972, *Harper v. Kleindienst*, Civil Action No. 1607-72 (D. D. C. 1972), Appendix A, *infra*, at 2a.

[5] See Letter of June 30, 1972, from David L. Norman to Daniel R. McLeod, A. 47-50. Appellants' statement (Brief for Appellants 7) (hereinafter cited as "Br. App.") that the "Attorney General declined to object to Section 2 of Act 1205, explaining that he would not exercise his own judgment under Section 5 . . ." is not accurate. No such explanation appears in the letter.

[6] Stipulations, Par. 1, A. 53.

[7] A. 51-52.

[8] 362 F. Supp. 742 (D. D. C. 1973), affirmed *sub nom. Harper v. Levi*, 520 F. 2d 53 (D. C. Cir. 1975).

[9] 57 STAT. 2071 (1971).

[10] See Letter of March 6, 1972, from David L. Norman to Daniel R. McLeod, A. 26.

General requested additional information from the State, which was received by him on January 5, 1972.[11] The Attorney General then considered the submission to be complete and under his guidelines the sixty-day period of Section 5 began to run.[12]

Shortly after the State submitted the 1971 Plans, a suit was brought in the District Court for the District of South Carolina on behalf of all black voters who resided in multimember Senate districts. The plaintiffs sought an injunction against enforcement of the 1971 Plans on the ground, *inter alia*, that their use of multimember election districts abridged the rights of black voters on account of race or color. This suit will be referred to as *Harper I* in this brief.[13] The *Harper I* plaintiffs also claimed that the 1971 Plans violated Section 5 of the Voting Rights Act, that they had not been precleared pursuant to Section 5, and that they could not be enforced by the State until preclearance was obtained.

At the request of the *Harper I* District Court, the Attorney General submitted an *amicus* memorandum in which he advised that the court might wish to defer ruling on the Fourteenth and Fifteenth Amendment questions raised by the *Harper I* suit until the Attorney General had completed his Section 5 review.[14] The Attorney General also advised that any question of whether the 1971 Plans had the purpose or effect of abridging minority voting rights under Section 5 could be determined only by the District

[11] *Id.*
[12] *Id.*
[13] *McCollum v. West*, C. A. 71-1211 (D. S. C., Complaint filed Dec. 7, 1971) (unreported). One of the named plaintiffs in *McCollum* was John Roy Harper II. *McCollum* was consolidated with several other cases challenging the 1971 Plan, all of which are sometimes referred to under the style of *Twiggs v. West*. This usage is misleading, since *Twiggs* was a Fourteenth Amendment suit presenting no question of minority voting rights *per se*.
[14] Memorandum for the United States, filed Feb. 1, 1972, in *McCollum v. West*, C. A. 71-1211 (D. S. C. 1972), 6-7, 8. This document is Exhibit 1 to Deposition of James P. Turner (R., Document #20).

Court for the District of Columbia.[15] Contrary to the statement of appellants,[16] the Attorney General did not ask the court to enjoin enforcement for lack of preclearance without reaching the constitutional issues raised by the plaintiffs.

On March 6, 1972, the Attorney General interposed objection to the 1971 Plans, stating only that he was "unable to conclude" that the use of multimember districts in combination with a majority vote requirement in the primaries and numbered Senate seats would not have the effect of abridging black citizens' right to vote on account of race or color.[17]

On April 7, 1972, the District Court in *Harper I* struck down the 1971 Plans, finding that they violated the Fourteenth Amendment one man, one vote principle. In its order, the *Harper I* Court expressly rejected the racial discrimination claims of the plaintiffs, claims that had been the subject of an extensive evidentiary record and full briefing and argument by counsel.[18] As noted by appellants, the court did not rule on the merits of the Section 5 claims.[19] The court retained jurisdiction, but declined to draw a constitutional reapportionment plan itself unless the General Assembly failed to do so within thirty days.

On May 6, 1972, a new Senate reapportionment statute, containing the Senate plan now at issue, was signed into law by the Governor of South Carolina. This new plan was filed with the District Court for review under its retained jurisdiction to determine whether it satisfied the constitutional guidelines established in the court's April 7th order.

[15] *Id.* 5-6.
[16] See Br. App., 6.
[17] Letter of March 6, 1972, from David L. Norman to Daniel R. McLeod, A. 26-28.
[18] Order of April 7, 1972, *Twiggs v. West*, Civil Action No. 71-1106 (D. S. C. 1972) Jurisdiction Statement App. 26a-49a (hereinafter cited as "J. S.").
[19] Br. App. 6-7.

On May 23, 1972, the District Court entered an order approving the Senate Plan. A further order of June 9, 1972, rejected the claim of the *Harper I* plaintiffs that the Plan was racially discriminatory. From these decisions two appeals were noticed to this Court. One, *Powell v. West,* challenged the District Court's approval of the Senate Plan *sua sponte* without requesting the parties to present their views on it. This Court affirmed the District Court's order in the *Powell* appeal.[20] The second appeal, noticed by the *Harper I* plaintiffs, was based on Fifteenth Amendment grounds. This appeal was not perfected,[21] as will be more fully discussed below.

Harper II

After considering the submission of the Senate Plan for seven weeks, the Attorney General on June 30, 1972, stated that he would defer to the determination of the *Harper I* District Court and would enter no objection to the implementation of the Senate Plan.

On August 10, 1972, thirty days after the sixty-day period for objecting to the Senate Plan had expired, two of the named plaintiffs in *Harper I,* John Roy Harper II and Victoria DeLee, commenced an action in the District of Columbia challenging the Attorney General's failure to object to the Senate Plan. This suit,[22] which will be referred to as *Harper II* in this brief, rested on a claim that the Attorney General had erroneously taken into consideration the decision in *Harper I* in reaching his own decision not to object to the Senate plan. *Harper II* was brought on behalf of the same class of plaintiffs as *Harper I.* On August 10, 1972, the period in which the *Harper I* plaintiffs could perfect their appeal had not yet expired, and would not expire

[20] *Powell v. West,* 413 U. S. 901 (1973) (memorandum opinion).
[21] See Stipulations, Par. 7, A. 54.
[22] *Harper v. Kleindienst,* 362 F. Supp. 742 (D. D. C. 1973).

for over three months.[23] The plaintiffs chose to bring the *Harper II* action and chose not to press their *Harper I* claim that the Senate Plan was racially discriminatory on appeal to this Court.

On August 11, 1972, the single-judge District Court in *Harper II* entered an interlocutory order purporting to extend the time during which the Attorney General might interpose an objection to the Senate Plan. This order was based on a finding of "fact" that the time in which the Attorney General might interpose objection to the Senate Plan under Section 5 had not expired.[24]

Some nine months later, on May 16, 1973, the District Court entered an order finding that the Attorney General's refusal to object to the Senate Plan was clearly erroneous. In response to the plaintiffs' contention that the Attorney General "made no findings at all" in deciding not to object to the Senate Plan, the District Court ordered the Attorney General to make a "reasoned decision in accordance with his statutory duty." [25] In response to this order, the Attorney General filed a memorandum in which he stated that the Senate Plan "has a clear and substantial racial effect in contravention of the Fifteenth Amendment and its protections under Section 5 of the Voting Rights Act." [26] In reaching his conclusion that the Plan violates the Fifteenth Amendment, the Attorney General noted that it would be possible to draw single-member election districts which "would have resulted in four or five election districts with black population majorities." [27] Nevertheless, the Attorney

[23] See Stipulations, Par. 7, A. 54.
[24] See Order of August 11, 1972, *Harper v. Kleindienst,* 362 F. Supp. 742 (D. D. C. 1972), Br. App., Appendix A, 1a-2a.
[25] 362 F. Supp. at 746.
[26] See Memorandum of United States in Response to the Court's Order of May 16, 1973, (filed July 16, 1973) in *Harper v. Kleindienst,* 362 F. Supp. 742 (D. D. C. 1973), Br. App., Appendix B, 8a.
[27] *Id.* at 6a.

General declined to enter an objection to the Senate Plan because he felt constrained to defer to the Fifteenth Amendment determination of the *Harper I* court.[28]

On July 19, 1973, the District Court entered a second order stating that Section 5 of the Voting Rights Act required the Attorney General to object to the Senate Plan. Pursuant to the District Court's order, the Attorney General objected to the Senate Plan on July 20, 1973, over one year after the expiration of the sixty-day period.[29]

The District Court's order in *Harper II* was affirmed by a three-judge panel of the Court of Appeals, one judge dissenting, on July 24, 1975.[30] That review became final on October 22, 1975, when the time for filing a petition for a writ of *certiorari* in this Court expired.

The Proceedings Below

The appellants filed this suit on November 7, 1975, alleging in their complaint that South Carolina had not obtained authority to enforce the Senate Plan under Section 5. It was conceded by all parties at the outset that the racial discrimination issues litigated in *Harper I* were not presented in this case and were not being relitigated.[31] It was also conceded by all parties that the Senate Plan is legislation covered by the Voting Rights Act and that compliance with the preclearance provisions of Section 5 of the Act is a prerequisite to implementation of the Plan by South Carolina. The appellants presented three main arguments below: (1) they claimed that the State of South Carolina was collaterally estopped by the *Harper II* decision and, therefore, could not present a defense on the merits; (2)

[28] *Id.* at 8a, 11a.

[29] See Letter of July 20, 1973, from J. Stanley Pottinger to Daniel R. McLeod, A. 51-52.

[30] *Harper v. Levi*, 520 F. 2d 53 (D. C. Cir. 1975).

[31] See Excerpts from Pretrial Conference held Dec. 4, 1975, in *Morris v. Gressette*, Civil Action No. 75-1998 (D. S. C. 1975), A. 13-15.

they claimed that the *Harper II* decision was correct in holding that the Attorney General's non-objection was reviewable under the Administrative Procedure Act; and (3) they claimed that the Attorney General was legally erroneous in considering the *Harper I* decision as a basis for his non-objection. The appellees argued in reply that: (1) the State was not estopped by *Harper II* from contesting on the merits; (2) that the Attorney General's failure to object within sixty days authorized South Carolina to enforce the Senate Plan; (3) that the Attorney General's non-objection was not reviewable under the APA; (4) that the Attorney General's subsequent objection to the Senate Plan was additionally invalid because it was interposed by order of a court acting without jurisdiction; and (5) that the Attorney General's decision to defer to the *Harper I* decision was legally proper and within his discretion under Section 5.

The United States filed an *amicus curiae* memorandum, in which it declined the invitation of the District Court to participate in the case on the ground that it was "unable at this time to fully address the issues in this case."[32] Attorneys from the Justice Department also appeared at the hearing before the three-judge court, but declined to participate in oral argument.

On March 12, 1976, the District Court filed its opinion and order. On the question of collateral estoppel, it held that South Carolina was not precluded by *Harper II* from defending the suit on the merits. On the merits, the District Court held that the Attorney General's failure to object

[32] Amicus Memorandum of the United States, filed January 28, 1976, in *Morris v. Gressette*, Civil Action No. 75-1998 (D. S. C. 1976), 4. Appellants' statement (Br. App. 11) that the "United States, appearing as amicus curiae, acknowledged the correctness of the *Harper* determination that the Attorney General was obligated to reach his own independent judgment on Act 1205" is inaccurate. No such statement appears in the Memorandum. The United States did state that because of the Supreme Court's decision in *Connor v. Waller*, "the Attorney General decided not to seek further review of the *Harper* decision." *Id.* 8.

within the sixty-day period was not reviewable under the APA because:

> the action of the Attorney General under § 5 . . . is (1) not adjudicatory, and (2) any party with standing who was dissatisfied with his action had an "adequate remedy in a court," and (3) there were not simply "persuasive" but compelling reasons to believe nonreviewability of that action was "the purpose of Congress." [33]

The Court, therefore, concluded that

> the determination made by the Attorney General under § 5 is not reviewable and, when he failed within sixty (60) days after submission to interpose an objection to the South Carolina Senate reapportionment as provided in Act 1205, the State of South Carolina was automatically authorized to enforce it; subject to the right of any proper party or parties to assail the constitutional validity of that legislation in an appropriate action.[34]

In view of this holding, the District Court did not reach or decide the remaining issues raised by the parties.[35]

Appellants' subsequent motions to alter or amend the judgment and for an injunction pending this appeal were denied by the District Court on March 30, 1976. The appeal from the judgment of the District Court was docketed in this Court on April 28, 1976. The Court noted probable jurisdiction on December 6, 1976.

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[33] J. S. App. 14a.
[34] *Id.* 25a.
[35] The District Court did not purport to sit in appellate review of the *Harper II* decision, as is perhaps suggested by appellants' characterization of the holdings below. See Br. App. at 12 (first full paragraph). The District Court did not reach any questions as to the jurisdiction or authority of the *Harper II* District Court.

SUMMARY OF ARGUMENT

I

South Carolina is authorized by Section 5 of the Voting Rights Act to enforce its present Senate reapportionment plan. The State submitted the Senate Plan to the Attorney General for Section 5 preclearance promptly after it was enacted by the South Carolina General Assembly. The Attorney General deemed the submission to be complete on May 12, 1972, giving him sixty days from that date within which to object to the Plan under Section 5. The Attorney General did not object to the Plan within sixty days after May 12, 1972, thus rendering it fully enforceable by the State. *Allen v. State Board of Elections,* 393 U. S. 544 (1969).

II

The Attorney General's decision not to object to the Senate Plan within the sixty-day period is not reviewable under the Administrative Procedure Act (APA). The preclearance provisions of Section 5 were designed to provide a rapid method for rendering State voting laws enforceable. Review of the Attorney General's preclearance decisions would delay preclearance, thus defeating the purpose of the statutory scheme. Congress has for this very reason rejected proposals to amend Section 5 preclearance so as to bring it under the APA. Furthermore, Congress has provided that private parties may bring a traditional injunctive action against enforcement of a voting change if the Attorney General does not interpose objection under Section 5. This congressionally specified procedure is an adequate alternative to APA review and was intended by Congress to be exclusive. *Allen v. State Board of Elections, supra.*

Section 5 does not specify the standards or procedures to be applied by the Attorney General in reaching preclear-

ance decisions. *Georgia v. United States,* 411 U. S. 526 (1973). Thus, administrative preclearance is a matter committed to agency discretion by law. The Attorney General has no Section 5 duty to make a "reasoned decision on the merits" of each submitted change. Section 5 permits him to take no action on a submission within the sixty-day period. Therefore, the Attorney General's decision not to object to the Senate Plan cannot be reviewed on the ground that it was in breach of his Section 5 duty to make an independent determination on the merits of the Section 5 issue and to give a reasoned decision for not objecting, since no such duty is imposed by the statute.

To permit APA review of preclearance decisions would not only destroy preclearance as a rapid method for enforcing State laws, but would also expose the judgments of courts in traditional Fifteenth Amendment suits to a novel form of collateral attack. Rather than appealing from adverse judgments in such suits, plaintiffs could attempt to prevent enforcement of the challenged voting changes by seeking to force a Section 5 objection to the change through APA review. To permit APA review would also circumvent the congressional requirement that all suits involving questions under Section 5 be heard and determined by a court of three judges. *Allen v. State Board of Elections, supra.*

III

Assuming, *arguendo,* that the Attorney General's preclearance decisions are subject to judicial review, his decision not to object to the Senate Plan was a reasonable exercise of his discretion. The non-objection was based upon the Attorney General's decision to defer to the determination by a court acting within its jurisdiction that a submitted voting change did not violate the Fifteenth Amendment.

This procedure was noted and implicitly approved in *Georgia v. United States, supra.* Simply because the Attorney General could have reached his decision without regard to the *Harper I* court decision does not mean that it was unreasonable for him to consider it.

ARGUMENT

I

Section 5 of the Voting Rights Act provides that a State may enforce a voting change if the change has been submitted to the Attorney General and "the Attorney General has not interposed an objection within sixty days after such submission." Because the Attorney General did not interpose objection to the Senate Plan within sixty days after it was submitted to him, South Carolina may enforce the Plan.

This is a case of first impression in this Court.[1] Although it involves a question arising under Section 5 of the Voting Rights Act,[2] it is unlike previous Section 5 cases that have been decided here.[3] Prior cases involved challenges to the constitutionality of Section 5,[4] claims that a particular type of voting change was not covered by the statute,[5] or the substantive issue of whether a voting

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[1] In *State Board of Election Commissioners v. Evers,* 405 U. S. 1001 (1972), a similar question was presented on different facts. This Court dismissed the appeal for failure of the appellants to docket timely, so that the merits were not considered.

[2] 42 U. S. C., Section 1973c.

[3] The Court has decided questions arising under Section 5 in ten major cases: *South Carolina v. Katzenbach,* 383 U. S. 301 (1966); *Allen v. State Board of Elections,* 393 U. S. 544 (1969); *Hadnott v. Amos,* 394 U. S. 358 (1969); *Perkins v. Matthews,* 400 U. S. 379 (1971); *Connor v. Johnson,* 402 U. S. 690 (1971); *Georgia v. United States,* 411 U. S. 526 (1973); *Connor v. Waller,* 421 U. S. 656 (1975); *City of Richmond v. United States,* 422 U. S. 358 (1975); *East Carroll Parish School Board v. Marshall,* 424 U. S. 636 (1976); *Beer v. United States,* 425 U. S. 130 (1976).

[4] *South Carolina v. Katzenbach, supra; Georgia v. United States, supra.*

[5] *Allen v. State Board of Elections, supra; Hadnott v. Amos, supra; Perkins v. Matthews, supra; Connor v. Johnson, supra; Georgia v. United States, supra; Connor v. Waller, supra; East Carroll Parish School Board v. Marshall, supra.*

change was racially discriminatory.[6] None of those questions is presented by this appeal.

All parties to this action agree,[7] as did the District Court,[8] that the Senate Plan is covered by the Voting Rights Act and that compliance with Section 5 of the Act was a legal prerequisite to its enforcement. In this important respect this action differs from *Connor v. Waller,* 421 U. S. 656 (1975), cited and relied upon by appellants.[9] Unlike *Waller,* in which the District Court held that legislatively enacted reapportionment plans for both houses of the Mississippi legislature need not be submitted to the Attorney General, there was no pretension by South Carolina officials nor by the District Court in *Harper I* that Section 5 did not apply to the Senate Plan after it was enacted by the state legislature. There was no attempt to evade the Voting Rights Act by refusing to submit the Plan. The State took no steps to enforce the Plan before Section 5 preclearance was obtained. On the contrary, South Carolina scrupulously complied with the Voting Rights Act.[10] The question before this Court is not whether South Carolina has complied with Section 5, but whether, having complied fully, it is authorized by Section 5 to enforce its own legislation.

The Attorney General considered the submission of the Senate Plan to be complete under his guidelines on May 12, 1972. The Plan was precleared for enforcement by the Attorney General's letter of June 30, 1972, in which he stated:

[6] *City of Richmond v. United States, supra; Beer v. United States, supra.*

[7] See Br. App., 3, n.1.

[8] J. S., App. 2a.

[9] See Br. App. 11, 12, 21. See also Brief for the United States As Amicus Curiae, 8, n. 4; 10, n. 6 (hereinafter cited as "U. S. Juris. Br.").

[10] Appellants' insinuation that South Carolina's subsequent conduct is an "evasive tactic" designed to "deny minorities their voting rights" (Br. App., 19), should be viewed against the State's prompt, good faith compliance with Section 5. Of course, the assertion is also unsubstantiated by any evidence in the record.

"We enter no objection to the implementation of Plan A of Act No. 1205." No other action was taken by the Attorney General on or before July 11, 1972, the sixtieth calendar day after the submission.

In these circumstances, the language of Mr. Justice Blackmun's concurrence in *State Board of Election Commissioners v. Evers,* 405 U. S. 1001, 1003-4 (1972), could not be more in point:

> Section 5, it seems to me, plainly and clearly provides that if the procedure has been properly submitted to the Attorney General, as it was, "and the Attorney General has not interposed an objection within sixty days after such submission," as he did not, the proposed statutory changes "may be enforced" without the court proceeding in the District of Columbia and without resubmission to the Attorney General. Here the proposal was properly submitted to the Attorney General and he took no action by way of interposing an objection within the allowed 60 days. I do not see how the statute can be read or construed in any way other than to the effect that the conditions of its proviso were fulfilled and that the proposed new legislation was therefore enforceable subject, of course, to the statute's recognized exception as to any contest on the merits. I see nothing in *Perkins v. Matthews,* 400 U. S. 379, 385, (1971), which supports a contrary conclusion.

The same construction was given to Section 5 in *Vinik v. Smyth,* No. Civ. 71-89, TUC WEC (D. Ariz. Oct. 4, 1971).[11]

In that case, the plaintiffs sought an injunction against the enforcement of a State law providing for decennial cancellation of all voter registration. It was conceded that the change was subject to Section 5 and the claim for relief

[11] The case is unreported. The full text of the opinion is reproduced in Appendix C, *infra.*

was based on the allegation that the State had not obtained authority to enforce the change as required by Section 5. A unanimous three-judge court granted summary judgment:

> The submission was voluminous and detailed. It was received by the Department of Justice on July 12, 1971. If the sixty day period for Justice Department examination began on July 12, it would have expired on September 10, 1971. No evidence was introduced of any objection having been interposed to the legislative change in question, by the Attorney General of the United States at the hearing on September 30, 1971.
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> • • • •
>
> We hold that the Attorney General of Arizona complied with the provisions of Section 5 by his submission on July 8, 1971; that the 60 day period provided in Section 5 of the Voting Rights Act of 1965, terminated upon the expiration of 60 days from the receipt of the submission by the Attorney General of the United States, i. e., September 10, 1971; that the Attorney General of the United States has not interposed an objection within the 60 day period following submission, and therefore, the Arizona law . . . may be enforced.[12]

In *Allen v. State Board of Elections*,[13] this Court said of Section 5:

> It provides that a State may enforce a new enactment if the State submits the new provision to the Attorney General of the United States and, *within 60 days of the submission*, the Attorney General does not formally object to the new statute. . . . [Emphasis added.]

If, as Section 5 plainly states, the Attorney General's failure to take any action within sixty days would permit South Carolina to enforce the Senate Plan, it is difficult to see how his affirmative statement that he would not object to the

[12] Appendix C, *infra*, at 13a, 14a.
[13] 393 U. S. 544, 549 (1969).

Plan could jeopardize the State's authority to implement it. Yet it is precisely such an anomalous conclusion that the appellants invite this Court to reach.

II

The Attorney General's decision not to object to the Senate Plan within the sixty-day period is not subject to review under the Administrative Procedure Act.

The appellants' position that the Senate Plan was not precleared because of the Attorney General's objection on July 20, 1973, is defensible only if the decision in *Harper II* was valid. The *Harper II* court's suspension of the sixty-day requirement and its subsequent holding that an objection to the Senate Plan "is required by Section 5" prompted the Attorney General to reverse his previous decision not to interpose an objection. Without the order of the *Harper II* court the objection by the Attorney General, 434 days after submission, was of no effect. The central question, therefore, is whether the *Harper II* decision was correct. The *Harper II* opinion rests on the conclusion that the decisions of the Attorney General under Section 5 are subject to APA review. In its opinion below, the District Court in this case held that:

> . . . the determination made by the Attorney General under Section 5 is not reviewable and, when he failed within sixty (60) days after submission to interpose an objection to the South Carolina Senate reapportionment. . ., the State of South Carolina was automatically authorized to enforce it. . . .[14]

Because the question of APA reviewability is critical to the success of their action, appellants argued below that the principle of collateral estoppel prevented the appellees from raising the defense that the Attorney General's non-

[14] J. S. App., 25a.

objection was valid and unreviewable under the APA. Relying principally on two decisions of this Court, *Blonder-Tongue v. University Foundation,*[15] and the *Penn-Central Merger Cases,*[16] appellants asserted that *Harper II* foreclosed defendants from litigating the reviewability issue. The District Court's rejection of the collateral estoppel argument is well-reasoned and needs no repetition here.[17]

Having failed in their collateral estoppel argument below, appellants raise it only obliquely in this Court.[18] The main thrust of their argument here is not that the question of APA reviewability cannot be raised, but that it is irrelevant. The argument may be summarized as follows. Assuming that the *Harper II* court could not review the Attorney General's decision not to object to the Senate Plan, it nevertheless had independent authority to suspend the sixty-day requirement of Section 5 under the rule in *United States v. United Mine Workers,* 330 U. S. 258 (1947). Once the court suspended the sixty-day period, the Attorney General's objection, entered over a year later, was valid under Section 5.

This argument is erroneous for at least two reasons: (1) The *United Mine Workers* rule is a rule of criminal contempt, wholly inapplicable to the facts of this case. The rule states that a party to a lawsuit may not disobey a court

[15] 402 U. S. 313 (1971).
[16] 389 U. S. 486 (1968).
[17] See J. S. App., 5a-13a.
[18] See Br. App., 18-20. Interestingly, appellants' brief never mentions the collateral estoppel issue by name. A careful reader of their brief might not even be aware that *they* raised it below. Rather one is left with a vague impression that the suit below was an attempt by South Carolina to have *Harper II* overruled or an evasive tactic to deny minority voting rights. See n. 9, *supra.* Pursuing the collateral estoppel issue indirectly before this Court, appellants argue that South Carolina was not a "stranger to the judicial review proceedings in *Harper* to review the Attorney General's initial decision not to object." In a statement which smacks of Orwellian "newspeak," they claim "[i]t was South Carolina which initiated the legal proceedings" in *Harper II* by submitting the Senate Plan to the Attorney General for Section 5 preclearance. Br. App., 18. The sophistry of this argument is apparent.

order simply because he believes it is an invalid order. Appeal from the order, not disobedience, is the proper method to challenge its validity. If a party chooses to disobey the order, he may be punished for contempt of court. It is no defense to a contempt citation that the order disobeyed was invalid.[19] *United Mine Workers* does not foreclose a challenge to the validity of a court order in the context of proceedings other than criminal contempt for disobedience. (2) The *validity* of an order purporting to suspend the sixty-day period cannot be established by the *United Mine Workers* rule. That rule does not concern the validity of orders, but only the power of the courts to issue them. Unless the order in *Harper II* suspending the sixty-day period was correct as a matter of law, the Attorney General's objection is of no legal effect under Section 5.[20] The Court of Appeals in *Harper II* appreciated this point when it tied the validity of the suspension order to the question of APA reviewability.[21] Appellants have offered no other reason why the suspension order was valid. Therefore, it is essential to their case to establish that the Attorney General's nonobjection to the Senate Plan was reviewable under the APA. For the reasons that follow, however, APA review is not available for decisions made pursuant to Section 5 of the Voting Rights Act.

[19] Cf., *Walker v. City of Birmingham,* 388 U. S. 307 (1967).
[20] The soundness of this conclusion can be seen by considering two hypothetical questions. What would be the effect of the Attorney General's objection under Section 5, if the Court of Appeals in *Harper II* had reversed the suspension order of the District Court? What would be the effect of the Attorney General's objection under Section 5, if there had been no *Harper II* lawsuit and he had merely interposed objection *sua sponte?* Both hypotheticals illustrate that the Attorney General's authority to interpose objection more than a year after the submission was complete rests on the suspension order. If that order was erroneously entered then the Attorney General had no authority to interpose objection.
[21] See *Harper v. Levi, supra,* at 520 F. 2d 60-61. The United States in its *amicus* brief as to jurisdiction also points out that the *Mine Workers* case is inapplicable. See U. S. Juris. Br., 19, n. 10.

Speaking to the preclearance requirements of the Voting Rights Act in *Allen v. State Board of Elections,* this Court stated:

> Once the State has successfully complied with the Section 5 approval requirements, private parties may enjoin the enforcement of the new enactment *only* in traditional suits attacking its constitutionality; *there is no further remedy provided by Section 5.*[22]

As this language suggests, Section 5 left open only one course of action to appellants after the Attorney General entered no objection to the Senate Plan. That course of action was not review of the Attorney General's decision under the APA, but an injunctive suit attacking the constitutionality of the Plan.[23]

Under the express terms of the APA, agency action is not subject to review in three situations:

> (1) where the statute authorizing agency action precludes judicial review;[24]
>
> (2) where there is other adequate remedy in the courts;[25] and
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> (3) where agency action is committed to agency discretion by law.[26]

The Attorney General's preclearance decisions under Section 5 fall within all three exceptions to APA review.

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[22] 393 U. S. 544, 549-50 (1969) (emphasis added).

[23] Appellants were not precluded from bringing a traditional suit by the decision in *Harper I.* In its Order of June 9, 1972, the *Harper I* court specifically stated:

> Any party seeking to challenge Plan A may, of course, bring an action seeking further relief. If such a party can prove Plan A constitutionally infirm based on facts not previously presented to this Court, relief would not be barred by the doctrine of *res judicata.*

[24] 5 U. S. C. Section 701(a) (1).

[25] 5 U. S. C. Section 704.

[26] 5 U. S. C. Section 701(a) (2).

A

Congress's intent to preclude review is fairly discernible from the statutory scheme and legislative history of Section 5.

Turning to the first exception,[27] a reading of Section 5 shows that it is silent on preclusion of judicial review. In such circumstances the applicable rule is that "judicial review . . . will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner,* 387 U. S. 136, 140 (1967). The rule has also been stated as follows: "There is no presumption against judicial review . . . unless that purpose is fairly discernible in the statutory scheme." *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U. S. 150, 157 (1970). In determining whether Congress intended to preclude judicial review, courts look to the pattern and purpose of the statutory scheme and to the legislative history of the statute. *Switchmen's Union of North America v. National Mediation Board,* 320 U. S. 297 (1943).[28]

Applying these rules in the instant case, the District Court reviewed the purpose and history of Section 5 and concluded:

> There were not simply "persuasive" but compelling reasons to believe nonreviewability of that action "was the purpose of Congress."[29]

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[27] The second and third exceptions are discussed below under argument headings B. and C., respectively.

[28] Cited with approval in *Brotherhood of Railway and Steamship Clerks v. Employees Association,* 380 U. S. 650, 659-60 (1965), and *Association of Data Processing Service Organizations, Inc. v. Camp, supra,* at 157.

[29] J. S. App., 14a.

(1) Judicial review of administrative preclearance decisions would defeat the purpose of Congress to provide an expeditious means by which the State can obtain authority to enforce voting changes.

As originally proposed by the Johnson Administration and considered by the Judiciary Committees of the House and Senate, the Voting Rights Act did not contain any provision for submission of voting changes to the Attorney General.[30] Section 8 of the original bill provided only for a declaratory judgment action in the District Court of the District of Columbia.[31] Several members of the House expressed concern at the undue delay this procedure would cause in the implementation of State voting changes:

> The District Court for the District of Columbia already has a huge backlog of over 4,000 civil cases. With the median time of 28 months required from the time of filing an action in this court to the disposition after trial, this provision of the committee-Celler bill will contribute to a long delay in the hearing of such cases. In the meantime, State voter qualifications and standards are suspended without relief. If such drastic effects must be visited upon the States involved, resolution of this class of cases should be handled expeditiously.[32]

Similar concern about the burden placed on the States by having to litigate in the District of Columbia was expressed during the Senate Judiciary Committee hearings.[33]

[30] The briefs on appeal in *Harper II* do not mention most of the legislative history which will be discussed here. Apparently the Court of Appeals thought that the testimony of Attorney General Katzenbach quoted in the following paragraph was the only "morsel of legislative history" on the question of nonreviewability. See *Harper v. Levi*, at 520 F. 2d 65. One may speculate that the Court of Appeals would have reached a different conclusion on nonreviewability if it had been fully apprised of the legislative history of Section 5.

[31] *Id.*

[32] H. R. Rep. No. 439, 89th Cong., 1st Sess., 38 (1965) (footnotes omitted).

[33] See *e. g., Hearings on S. 1564 Before the Senate Committee on the Judiciary*, 89th Cong., 1st Sess., pt. 1, 69-73 (1965).

Recognizing that the requirement of a declaratory judgment for every voting change was an unduly burdensome intrusion upon State sovereignty and that it would be desirable to include some procedure for rapid clearance of voting changes, Attorney General Katzenbach suggested the possibility of permitting the States to submit voting changes to the Attorney General and permitting the changes to be enforced if there was no objection to them within a given period of time:

> Senator ERVIN. It seems to me that is a drastic power which can hardly be reconciled with the federal system of government, if we still have a federal system of government.
>
> Attorney General KATZENBACH. I think it is quite a strong power, Senator. The effort is to prevent this constant slowing down process which occurs when States enact new laws that may clearly be in violation of the 15th Amendment, but you have to go through the process of getting judicial determinations of that. It takes a long time. In the interval the purposes of the act are frustrated.
>
> Now, there may be better ways of accomplishing this. I do not know if there are. There are some here I can imagine, a good many provisions of State law, that could be changed that would not in any way abridge or deny the right; and we, perhaps, except for the fact that some members of the committee, I think, including yourself, have had difficulty with giving the Attorney General discretion on some of these things—perhaps this could be improved by applying it only to those laws which the Attorney General takes exception to within a given period of time. Perhaps that would remove some of the burdens.[34]

In accordance with this suggestion, the Committee amended the bill to provide for administrative preclearance within

[34] *Id.*, at 237.

sixty days. This provision was, of course, adopted by the Congress and is now an integral part of Section 5.

The legislative history of the 1975 extension of the Voting Rights Act reveals that this congressional purpose remains unchanged today. Administrative preclearance under Section 5 was the focus of considerable discussion and debate in 1975.[35] The remarks of Congressman Andrew Young, a proponent of extending Section 5 preclearance, are representative of statements throughout the record urging retention of administrative preclearance as an expeditious method of rendering voting changes enforceable under the Act:

> Opponents of the Voting Rights Act . . . have claimed that preclearance is burdensome, time-consuming, and expensive. They assert that most voting changes are "minor" or "technical." But the preclearance procedure clearly is more efficient than case-by-case lawsuits. The Attorney General is supposed to act on preclearance submissions within 60 days.[36]

Finally, it should be noted that Congress specifically amended Section 5 in 1975 to provide for expedited consideration of voting changes within the sixty-day period.[37] This amendment is further evidence that Congress intended administrative preclearance to be free from unnecessary delays so that voting changes could be promptly implemented by the submitting State.

The effect of judicial review of the Attorney General's Section 5 decisions would be to nullify a statutory scheme carefully designed to avoid the delays and burdens of litigation. Review would result in uncertainty as to the validity of State laws years after their enactment, would

[35] See *e. g.*, 121 CONG. REC. H4721 (Daily ed. June 2, 1975) (Mr. Edwards); *Id.*, H4745 (Ms. Jordan); *Id.*, 4724-25 (Mr. Butler).
[36] 121 CONG. REC. H4708 (Daily ed. June 2, 1975).
[37] See Section 406, P. L. 94-73, 89 STAT. 404-405 (1975); S. Rep. No. 295, 94th Cong., 1st Sess., 43 (1975).

unnecessarily consume the judicial resources of several courts and would needlessly disrupt the orderly processes of State government. Indeed, as the District Court below observed, the best illustration of this point is the record in this case:

> The delays that would follow, if judicial review of the Attorney General's determination were found to exist, are well illustrated by the record in *Harper,* which involved no real factual review but concerned only an issue of law. The action was begun in the District Court in August, 1972, but the District Court, though the parties submitted the case on an agreed statement of facts, did not decide it until the middle of May, 1973, almost ten months later. The appeal from that decision was not heard until September, 1974, and the opinion of the Court of Appeals was not filed until the end of July, 1975. In other words, the right of the State to enforce its legislation, if Section 5 is to be construed as plaintiffs contend and as *Harper* held, would have been delayed from May 2, 1972, to end of July, 1975, a period of over three years. It was this very delay, so graphically demonstrated by the record in this case which Congress, by providing for Attorney General clearance, sought to avoid.[38]

The relationship between the purpose of providing rapid preclearance and excluding other judicial remedies was also recognized by this Court in *Allen*:

[38] J. S. App. 22a, n. 28. See also *Harris v. Levi,* 416 F. Supp. 211, 215 (D. D. C. 1976) (footnote omitted):
In addition to conflicting with Congress' intent to allow rapid approval of nondiscriminatory voting reforms, judicial review of a decision by the Attorney General not to object to a voting statute is illogical. Should the reviewing tribunal find that the Attorney General's decision is not supported by the administrative record, the state could then seek further review from a three-judge panel, since section five authorizes this means of review whenever the Attorney General interposes an objection to a voting statute. Not only does this procedure involve a tremendous waste of judicial resources, but it forces the Attorney General to defend a suit he does not believe in.

> . . . Section 5 does not necessitate that a covered State obtain a declaratory judgment action before it can enforce any change in its election laws. It provides that a State may enforce a new enactment if the State submits the new provision to the Attorney General. . . and, within 60 days of the submission, the Attorney General does not formally object to the new statute or regulation. • • • • [T]he State is not required to first submit the new enactment to the Attorney General as it may go directly to the District Court for the District of Columbia. The provision for submission to the Attorney General merely gives the covered State *a rapid method of rendering a new state election law enforceable.* Once the State has successfully complied with the Section 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by Section 5.[39]

Thus, the intent of Congress to preclude judicial review is "fairly discernible in the statutory scheme." *Association of Data Processing Service Organizations, Inc. v. Camp, supra.*

> (2) **Congress has deliberately rejected alternative methods of preclearance that would have included APA review of the Attorney General's decisions, thus indicating that review is intended to be precluded.**

After the extension of the Voting Rights Act in 1970 the focus of congressional concern shifted from provisions primarily concerned with voter registration to Section 5 enforcement. This Court's decision in *Allen* had been followed by a marked increase in Section 5 submissions to the Attorney General and differing views had arisen as to what legal standard the Attorney General should apply in

[39] 393 U. S. 549-50.

reviewing them.[40] In May and June of 1971 the House Judiciary Committee conducted hearings on the enforcement of the Voting Rights Act during which the guidelines subsequently promulgated in 28 C. F. R., Section 51, *et seq.*, were extensively discussed. During these hearings the Attorney General proposed an amendment to Section 5 which would have brought the administrative preclearance scheme of the statute under the Administrative Procedure Act. The proposal was described by the Assistant Attorney General of the Civil Rights Division in his testimony before the Committee:

> We have felt the need, and the Attorney General has discussed it with me, for a proposal to the Congress to amend section 5, by making it possible in complex, complicated fact cases to have a hearing examiner, much as other agencies have, for the purpose of hearing evidence presented by all persons that are interested and that have evidence, for the purpose of making findings and tentative decisions and recommendations, and to proceed in the manner provided under the Administrative Procedure Act.
>
> • • • •
>
> . . . the Department of Justice is now developing a proposal to amend section 5 of the Voting Rights Act in order to provide for a full-scale adminstrative hearing under a hearing examiner when it is determined that a submission involves complex issues of fact. The final determination in such a case would be subject to judicial review in a court of appeals. We believe that such an amendmnet would faciliate proper evaluation by the Attorney General of voting changes, such as reapportionments and annexations, which require ex-

[40] See Statement of Joseph L. Rauh, Jr., *Hearings on the Enforcement of the Voting Rights Act Before the Civil Rights Oversight Committee of the House Judiciary Committee*, 92d Cong., 1st Sess., Ser. No. 8 at 114-115 (1971).

amination of complicated and often extensive demographic information.[41]

Congress declined to implement this very specific proposal for judicial review of the Attorney General's preclearance determinations, preferring instead to retain the original scheme of rapid administrative preclearance without foreclosing traditional suits for Fifteenth Amendment relief in the ordinary courts. When the Voting Rights Act was extended by Congress in 1975, Section 5 was re-enacted without amendment to the system of administrative preclearance. If Congress had desired to alter its previously devised scheme to permit judicial review under the Administrative Procedure Act, it clearly could have done so at that time. Thus, there is "persuasive reason to believe" that the purpose of Congress was to preclude such review.

The legislative history of Section 5 is all but ignored by appellants.[42] Instead they rely on *Dunlop v. Bachowski*[43]

[41] *Hearings on the Enforcement of the Voting Rights Act Before the Civil Rights Oversight Committee of the House Judiciary Committee*, 92d Cong., 1st Sess., Ser. No. 8, at 7, 6 (1971).

[42] The United States in its *amicus* brief as to jurisdiction likewise gives scant attention to legislative history, devoting only one paragraph to the subject. See U. S. Juris. Brief, 17 (first full paragraph).

Appellants do state that Congress was aware of the ruling in *Harper v. Levi* when it extended the Voting Rights Act in 1975. Br. App., 22, n. 28. The passages cited, however, have nothing to do with APA reviewability. The first citation is to a portion of the Senate Judiciary Committee Report on extension of the Voting Rights Act. S. Rep. No. 295, 94th Cong., 1st Sess., 18 (1975). The paragraph in question is a discussion of this Court's decision in *Connor v. Waller*, 421 U. S. 656 (1975). *Harper v. Kleindienst* is cited without comment as a footnote to the following sentence: "The [Supreme] Court [in *Connor v. Waller*] also ruled that the federal courts should not inquire into fourteenth and fifteenth amendment questions until all Section 5 questions had been determined." Since *Harper v. Kleindienst* does not stand for the quoted proposition (the question was not even raised in that suit), the extent of congressional "awareness" of the case is questionable. In any event, the bill reported out by the Senate Committee was not considered by either the Senate or the House and the floor debates make it clear that the Senate Report was not even printed at the time the Senate took up consideration of the House bill. See 121 CONG. REC. S13335, 13341, 13342 (Daily ed. July 22, 1975); *Id.*, S13618, 13621 (Daily ed. July 24, 1975) (Sen. Morgan). *(cont.)*

to support their argument that Congress did not intend to preclude APA review. As the District Court pointed out,[44] *Bachowski* does not support appellants' position, but undermines it. The statute in *Bachowski*, the LMRDA,[45] forbade private parties from resorting to the courts to challenge the validity of a union election. Thus *Bachowski* represents a textbook example of "agency action for which there is no other adequate remedy in a court."[46] As will be argued below,[47] Section 5 presents a very different picture. More to the point here is the obvious difference betwen the legislative history of the LMRDA and that of Section 5, outlined above. Upon examining the materials that the Secretary of Labor relied upon to claim a con-

[42] *(cont.)* Appellants' second citation is to a remark made by Rep. Edwards after the House version of the bill had passed the Senate. The issue before the House was whether to agree to a Senate amendment reducing the extension of the Voting Rights Act from ten to seven years and certain other amendments. Again the cited passage has nothing to do with APA review, which was not the question before the House and was not mentioned by Rep. Edwards:

> A 7-year extension is far from an ideal situation, but it can be lived with. And rather than endanger the life of the act itself, I believe that live with it, we must.
>
> Although I have not been able to obtain a copy of the decision, I should like to note, somewhat as an aside, how pleased I was to hear that only a few days ago the District of Columbia Court of Appeals had upheld the lower court's decision in Harper against Kleindienst. In that case the Justice Department had refrained from subjecting a South Carolina State Senate redistricting plan to section 5 or pre-clearance scrutiny because the local South Carolina District Court has approved the plan. The U. S. District Court for the District of Columbia found that the Attorney General had acted improperly and ordered him to make a "reasoned decision" on the Senate plans. It was that district court decision that was recently upheld and in so doing the court of appeals has again underscored the importance of having the system of section 5 review—whether it be carried out by the Attorney General or the U. S. District Court for the District of Columbia.

122 CONG. REC. H7631 (Daily ed. July 28, 1975) Since Congress amended Section 5 to make more explicit than before the Attorney General's right to take no action within the sixty-day period, it seems, if anything, to have disagreed with the *Harper* decision, which held that he has a statutory responsibility to make a "reasoned decision" on Section 5 submissions. See *infra*,

[43] 421 U. S. 560 (1975).

[44] J. S. App., 18a-19a.

[45] 29 U. S. C., Section 483.

[46] 5 U. S. C., Section 704.

[47] *Infra*, 30-33.

gressional purpose to preclude judicial review, this Court stated in *Bachowski*:

> They do not reveal to us any congressional purpose to prohibit judicial review. Indeed there is not even the slightest intimation that Congress gave thought to the matter of the preclusion of judicial review. [48]

This is in clear contrast to the legislative history of Section 5 in which provisions for judicial review of the determinations of the Attorney General were both considered and rejected.

B

Congress, in Section 5, specifically provided for de novo judicial proceedings as an "adequate remedy in a court" for parties who do not agree with the Attorney General's preclearance decisions.

In contrast to the LMRDA, which was at issue in *Bachowski,* Section 5 expressly provides a method whereby any party disagreeing with the Attorney General's preclearance decisions may seek relief in the courts. As this Court explained in *Allen*:

> If the Attorney General objects to the new enactment, the State may still enforce the legislation upon securing a declaratory judgment in the District Court for the District of Columbia.
>
> * * * * * * *
>
> Once the State has successfully complied with the Section 5 approval requirements, private parties may enjoin the enforcement of the new enactment . . . in traditional suits attacking its constitutionality. . . . [49]

The legislative history of Section 5 discloses that the provision allowing private parties to litigate the validity of a voting change that has been successfully precleared was not originally part of the Voting Rights Act as proposed by the House, but was added in the Conference Committee on the bill.[50] The House managers of the bill recommended adoption of this change.[51] Of course, Congress could have provided that the Attorney General's determination was conclusive of the rights of private parties and was the exclusive remedy under Section 5. Or Congress could have provided for some form of direct judicial review of the Attorney General's decisions not to object to State voting changes. But Congress chose neither of these alternatives. Instead, it provided for private parties to bring injunctive suits against the voting change directly, if they disagreed with the Attorney General's nonobjection.

The general rule applied in such circumstances is that the judicial forum prescribed by Congress is exclusive and other avenues of judicial review are not available.[52] This rule applies to preclude APA review of administrative action in cases where a *de novo* legal action may be instituted by a private party pursuant to statute.[53] The rule merely gives effect to the plain language of the APA which speaks of "final agency action for which there is no other adequate remedy in a court." [54]

Appellants do not quarrel with the stated principle. Instead they argue that the remedy of a traditional injunctive suit is "inadequate." [55] In support of their argument

[48] 421 U. S. 567.
[49] 393 U. S. 549-50.

[50] H. R. Rep. No. 711, 89th Cong., 1st Sess., 11 (1965).
[51] *Id.*
[52] *Whitney National Bank v. Bank of New Orleans and Trust Company*, 379 U. S. 411, 420-422 (1965); *Weahkee v. Powell*, 532 F. 2d 727, 729 (10th Cir. 1976); *E. I. duPont deNemours and Co. v. Train*, 528 F. 2d 1136, 1142 (4th Cir. 1975) cert. granted, 425 U. S. 933 (1976); *UMC Industries, Inc. v. Seaborg*, 439 F. 2d 953, 955 (9th Cir. 1971).
[53] *Weahkee v. Powell, supra; Klein v. Commissioner of Patents of United States*, 474 F. 2d 821, 824 (4th Cir. 1973); *UMC Industries, Inc., v. Seaborg, supra; Vogel v. Gottschalk*, 350 F. Supp. 865 (E. D. Va. 1972).
[54] 5 U. S. C. Section 704.
[55] Br. App. 28-31. The United States makes the same argument in its *amicus* brief. U. S. Juris. Br. 13-16.

appellants cite an impressive array of legislative and judicial authorities concerning the "inadequacy" of traditional injunctive suits to vindicate minority voting rights. However, the argument confuses the adequacy of private injunctive suits *standing alone* (the situation referred to in appellants' cited authorities) with the adequacy of such suits *as part of the Section 5 scheme* which also includes preclearance of voting changes (the situation in question here). Because covered jurisdictions know that all new voting procedures must be approved either by the Attorney General or by a declaratory judgment of the District Court for the District of Columbia, the incentives for subterfuge and evasion which existed prior to the 1965 Act have have largely been removed.[56] The very fact that voting changes may not be enforced without preclearance does away with the possibility of evading court decisions rendered in traditional injunctive suits through the use of new discriminatory devices. It was this opportunity for continual evasion—now foreclosed by Section 5—that made traditional suits, standing alone, an inadequate remedy.[57]

[56] It is a matter of public record that the vast majority of voting changes which have been submitted under Section 5 have been precleared even under the stringent standards applied by the Attorney General in his guidelines. Out of a total of 4,476 changes submitted from 1965 through 1974 only 163 were objected to by the Attorney General. In that period South Carolina submitted 941 changes of which only 19 were objected to. See *Hearings on H. R. 939 . . . Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee*, 94th Cong., 1st Sess., Ser. No. 1, pt. 1, 169 (1975).

[57] In testimony before Congress on extension of the Voting Rights Act the Assistant Attorney General for the Civil Rights Division stated:

> . . . the act has been unusually effective. It brought about a prompt, visible, dramatic increase in political participation by the black citizens in the South whose prior exclusion from the political process it was primarily designed to remedy. The results have fortunately been a general acceptance in the covered States of the resulting franchise of blacks, with important exceptions, of course, that require the continuing attention which extension would afford.

Statement of J. Stanley Pottinger, *Hearings on H. R. 939 . . . Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee*, 94th Cong., 1st Sess., Ser. No. 1, pt. 1, 280 (1975).

In Section 5 Congress specifically provided that:

> [N]either an affirmative indication by the Attorney General that no objection will be made nor the Attorney General's failure to object . . . shall bar a subsequent action to enjoin enforcement of such qualifications, prerequisites, standards, practices, or procedures.

This language clearly indicates that Congress foresaw that there would be situations in which private citizens might disagree with the Attorney General's decision and wish to seek relief from its consequences. If it was the judgment of Congress that such suits were of little value or that the remedy provided thereby was inadequate, there would have been no reason for Congress specifically to provide for such suits. Moreover, it is not necessary to conclude that the Attorney General's decision not to act on a voting change is without consequence, in order to reason that, regardless of his decision or its consequences, the citizen who wishes to challenge the change has an adequate remedy in the courts. Congress did not agree with appellants that such suits would not provide an adequate remedy; and where Congress has expressed its judgment by expressly providing a particular judicial proceeding, the adequacy of the procedure specified need not be inquired into further.[58]

[58] *Cf. Switchmen's Union of North America v. National Meditation Board*, 320 U. S. 297, 301 (1943).

C

Congress committed preclearance decisions to agency discretion by authorizing the Attorney General to establish his own standards for preclearance review and by authorizing him to make no response within the sixty-day period.

The administrative preclearance provisions of Section 5 represent the method by which Congress chose to balance what it considered to be competing constitutional interests in the area of voting procedures and qualifications. On the one hand, the national legislature felt that federal scrutiny of State voting changes was necessary to make the guarantees of the Fifteenth Amendment a reality for black voters in covered jurisdictions. On the other hand, federal scrutiny has been recognized by Congress and this Court to be a serious distortion of the federal structure of the Constitution and a grave intrusion into legitimate areas of State power.[59] Administrative preclearance was thus formulated as a means of minimizing the degree of interference with the State legislative process while at the same time providing adequate safeguards against abridgement of the franchise on account of race.

The success of this carefully devised scheme requires, by its very nature, a flexible exercise of administrative discretion if these competing interests are to be balanced as Congress intended. Voting changes may vary from the most trivial, such as changes from paper ballots to voting machines,[60] to the most complex, such as annexations and redistrictings.[61] The fact that the Attorney General must

[59] See, *e. g.*, *Allen v. State Board of Elections*, at 393 U. S. 562-63; *Georgia v. United States*, 411 U. S. 526, 543 (1973) (White, J., dissenting); 121 Cong. Rec. S13613 (Daily ed., July 22, 1975) (Sen. McClure); *Id.*, H4810 (Daily ed., June 3, 1975) (Mr. McClory).

[60] See, *e. g.*, *Perkins v. Matthews*, 400 U. S. 379, 387-388 (1971).

[61] See, *e. g.*, *City of Richmond v. United States*, 422 U. S. 358 (1975); *Beer v. United States*, 425 U. S. 130 (1976).

consider changes of enormously varying impact and complexity in itself argues that Congress intended to invest him with wide discretion under Section 5.

APA review of the Attorney General's actions would interfere considerably with his effectiveness in performing his Section 5 functions. If a disgruntled party could take the Attorney General to court and disagree with him—as the *Harper II* plaintiffs did—on such questions as when the sixty-day period begins to run, whether he can consider certain matters (*i.e.*, court decisions) in reaching his own decision not to object, or whether he has applied a proper standard of decision making (*i.e.*, deference), then quite obviously the Attorney General's ability to perform his Section 5 functions would be impaired.[62] Additionally,

[62] This point was made quite forcefully during the 1975 hearings in the context of a discussion about the appointment of federal examiners in covered jurisdictions.

> Mr. POTTINGER. * * * If we are in a position of being appealed under these special provisions, admittedly designed to have the Justice Department act promptly, in those areas where there are disputed facts, then we will no longer be able to act promptly. Regardless of administration, regardless of general policy, in the workings of the bureaucracy where we administer this tool, the result will inevitably be a slowdown as we begin writing opinions, looking over our shoulder to appellate court decisions, and arguing such decisions.
>
> Mr. BADILLO. Most agencies are subject to review by courts. If we use that theory then we would abolish all—
>
> Mr. POTTINGER. No, these are unique to the Federal Government in any regard one looks at them. There is no other Federal legislation to my knowledge in the history of the Republic that approaches these special provisions in their content. All others have review. If you wish to make these subjects to the same review, then I would bring to your attention that an executive agency's review brings bureaucracy to a grinding halt. It may be where such an agency has made a mistake it would be to the benefit of that agency and the act.
>
> I am suggesting you look at it very carefully before allowing such appeals, because I think it would hamstring us.

Hearings on H. R. 939 . . . Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 94th Cong., 1st Sess., Ser. 1, pt. 1, 300 (1975).

as the District Court below recognized, if private parties can litigate these matters, so can submitting authorities.[63] Judicial review would thus defeat the State's ability to obtain expeditious enforcement of its law on the one side and nullify the safeguard of federal preclearance on the other. A further adverse impact on agency effectiveness would result from the fact that "[c]lose judicial scrutiny inevitably leads to more formalized decision-making."[64] Although both voters and submitting authorities might find this desirable in a few cases, it would be unnecessary, inappropriate, and disruptive in the vast majority, especially since the Attorney General must consider hundreds of changes each year.

Another factor to be considered is that Congress chose not to prescribe, even in a general way, the standards and procedures to be followed in reaching a decision to object or not to object. The proviso of Section 5 (which we set forth in the margin[65]) is completely silent in this regard.[66]

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[63] J. S. App. 24a. In *Robinson v. Pottinger*, 376 F. Supp. 615 (M. D. Ala. 1974), an action was brought by the submitting authority against the Attorney General under the APA. The assertion of the United States (U. S. Juris. Br. 18) that "covered jurisdictions cannot obtain [APA] review of the Attorney General's determination" begs the question rather than responding to it. The further statement that "[p]erfect symmetry in judicial review proceedings is not required, so long as the substantial rights of all parties may be asserted in a judicial forum" (*Id.*) cuts against the Government's position, since private parties may assert their substantive rights in a judicial forum by bringing a Fifteenth Amendment injunctive action.

[64] *Hahn v. Gottlieb*, 430 F. 2d 1243, 1250 (1st Cir. 1970). *Hahn* contains a good discussion of the "committed to agency discretion" concept. See also Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

[65] *Provided*, That such qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the At- *(cont.)*

In *Georgia v. United States*,[67] this Court pointed out the absence of statutory guidelines to govern administrative preclearance decisions under Section 5. Faced in *Georgia* with a challenge to the Attorney General's authority to promulgate certain standards and procedures for preclearance review, the Court sustained the Attorney General, placing considerable emphasis on the fact that such matters were committed to his discretion by Congress.[68]

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[65] *(cont.)* torney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submmission, the Attorney General may reserve the right to reexammine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of Section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

[66] The contrast to *Citizens to Preserve Overton Park v. Volpe*, 401 U. S. 402 (1971), on which appellants rely (Br. App. 25), is quite clear. In *Overton Park* the applicable statutes stated that the Secretary of Transportation was not to approve a project that required the use of public parkland unless no feasible alternatives existed. Thus, as this Court recognized, there was "law to apply." 401 U. S. 411-413. Here there is no statute stating that the Attorney General may not consider the ruling of a federal court in deciding whether or not to object to a submitted voting change.

[67] 411 U. S. 526 (1973).

[68] The Court noted that Section 5 "is also silent as to the procedures the Attorney General is to employ in deciding whether or not to object to state submissions, as to the standards governing the contents of those submissions, and as to the meaning of the 60-day time period in which the Attorney General is to object, if at all." 411 U. S. at 536. The Court also recognized that the legal standards of review which the Attorney General was to apply were not specified in the Act and was, therefore, a matter committed to his discretion: "It is not necessary to hold that this allocation of the burden of proof by the Attorney General was his only possible choice under the Act, in order to find it a reasonable means of administering his Section 5 obligation." *Id.* at 538. Observing that "[t]he judgment that the Attorney General must make is a difficult and complex one," the Court also sustained the Attorney General's discretion in determining when a submission was complete, so that the 60-day period of the Act would begin to run. *Id.* at 540-41. That the Court's opinion implied a broad agency discretion was also perceived by the dissenting Justices. See Opinion of White, J., at 411 U. S. 543.

Appellants argue that *Georgia* is itself an example of judicial review of an Attorney General's action under Section 5 (Br. App. 27-28). This argument fails to recognize that the claim being made by the State of Georgia was that the Attorney General had no *authority* under Section 5 either to promulgate the administrative guidelines or otherwise to decide what burden of proof must be met, what constituted a *(cont.)*

It is also significant that Congress gave the Attorney General the option of simply failing to respond to a submission within the sixty-day period.[69] This point was recognized by Judge MacKinnon in dissent in *Harper v. Levi*:

> Surely no one would contend that if the Attorney General took no action whatsoever, as is clearly authorized by the statute, that inaction could be subject to judicial review under the APA. It is hard to imagine a clearer instance of a matter "committed to agency discretion by law." [70]

The lower federal courts have generally held that the Attorney General's preclearance decisions are not subject

[68] *(cont.)* submmission, or when the sixty-day period would run. The Court upheld the Attorney General's authority to establish the guidelines. This was not "judicial review" in the sense contended for by appellants in the present case nor does it establish that Attorney General preclearance does not come within the "committed to agency discretion" exception of the APA. It is widely recognized that courts may determine whether an official is acting beyond the scope of his statutory authority even in those cases where they cannot review the manner in which he exercises his authority. See *Addison v. Holly Hill Fruit Products Inc.*, 322 U. S. 607 (1944); *Brotherhood of Locomotive Engineers v. Denver and Rio Grande Western R.R. Co.*, 290 F. Supp. 612, 618 (D. Colo. 1968), aff'd., 411 F. 2d 1115, 1117 (10th Cir. 1969). There is, of course, no question that the Attorney General has authority to indicate that he will not interpose objection to a voting change.

[69] The 1975 amendments to Section 5 make even clearer than the original text of the statute that the Attorney General may take no action within the sixty days. Originally Section 5 spoke only of the Attorney General's "failure to object." See P. L. 89-110, 79 STAT. 439 (1965).

As amended, the statute now refers both to "an affirmative indication by the Attorney General that no objection will be made" and to "the Attorney General's failure to object." See J. S. App. 58a. Evidence placed before the House Judiciary Committee during the 1975 hearings also draws a clear distinction between taking no action and not objecting:

> Until the 60 days have passed the new practice or procedure cannot be implemented by the submitting jurisdiction. If the 60 days pass and the attorney general has taken no action or has not objected, the change can be put into effect.

Hearings on H. R. 939 . . . Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 94th Cong., 1st Sess., Ser. No. 1, pt. 2, 1523 (1975). The Chief of the Justice Department's Voting Section confirmed that this was a "correct statement of the general practice of the voting section in administering Section 5." See A. 39-41.

[70] 520 F. 2d at 73.

to judicial review, which further suggests that such decisions are committed to agency discretion by law. In *Common Cause v. Mitchell*,[71] the District Court for the District of Columbia was faced with a challenge to the Attorney General's failure to object to an Arizona statute providing for a statewide purge of voter registration lists and reregistration of voters. The Attorney General had initially taken the position that the State of Arizona was not required to submit the change, since the whole State is not covered by Section 5.[72] The change was subsequently submitted, however, and the Attorney General did not interpose objection. The plaintiffs' basic contention was similar to that made in *Harper II*, that the Attorney General had improperly considered the evidence before him in reaching the decision not to object. The District Court dismissed the action, holding that:

> . . . 42 U. S. C. § 1973c [Section 5] does not require the Attorney General of the United States to make determinations that are subject to the adjudicative and judicial review provisions of the Administrative Procedure Act.

In *United States v. Cohan*,[73] the court was faced with the question of "whether or not there was valid federal scrutiny of the submitted voting change" when the Attorney General's determination was "unsupported by reasons or reasoning and without any explicit finding of any racially discriminatory effect of the new voting procedure." [74] Again the issue was similar to that in *Harper II*: "whether the Attorney General has fulfilled his duties under Section 5 of the Voting Rights Act" in light of the claim "that the

[71] Civil Action No. 2348-71 (D. D. C. Mar. 20, 1972) (unreported).

[72] See Testimony of James P. Turner, *Hearings on the Enforcement of the Voting Rights Act Before the Civil Rights Oversight Committee of the House Judiciary Committee*, 92d Cong., 1st Sess., Ser. 8 at 56 (1971).

[73] 358 F. Supp. 1217 (S. D. Ga. 1973) (3-judge court).

[74] *Id.* at 1219.

Attorney General failed to make a Section 5 determination as to whether Plan A of Act 1205 has the purpose or effect of denying or abridging the right to vote on account of race or color. . . ." [75] Citing this Court's opinion in *Georgia*, the *Cohan* court unanimously agreed that the Attorney General's decision was a matter within his discretion and constituted valid federal scrutiny, although it was not a reasoned decision based on explicit findings.

In *Griffith v. United States*,[76] the same district judge who decided *Harper II* dismissed an action seeking review of the Attorney General's decision to object to voting changes in Kings County, New York. This result was approved by the Court of Appeals for the Second Circuit in *United Jewish Organizations of Williamsburgh v. Wilson*.[77] The Court of Appeals in *Williamsburgh* upheld the lower court's dismissal of the complaint against the Attorney General in that case on the ground that

> [T]he court below does not, however, have jurisdiction to "review" the Attorney General's determination of April 1, 1974, disapproving the 1972 Act, that jurisdiction being vested exclusively in the District Court for the District of Columbia. . . .[78]

In dictum the court went on to say:

> Appellants do not urge that a Voting Rights Act determination of the Attorney General is reviewable under the Administrative Procedure Act, probably because they concede it to be "committed to agency discretion by law." 5 U. S. C. § 701 (a) (2). Analogous determinations under § 407 of the Civil Rights Act of 1964, 42 U. S. C. § 2000c-6, have been held not subject to judicial review. *United States v. Greenwood Municipal Separate School Districts*, 406 F. 2d 1086 (5th Cir. 1969).[79]

[75] *Harper v. Kleindienst*, 362 F. Supp. at 744.

[76] Civil No. 74-648 (D. D. C. May 3, 1974) (unreported). The order of the court is reprinted in full in Appendix D, *infra*.

[77] 510 F. 2d 512, 520, n. 15 (2d Cir. 1975), cert. granted 423 U. S. 945 (1976).

[78] *Id.* at 520.

Other than *Harper II*, appellants have discovered only three cases in which the court was free to decide the question [80] that could be argued to support judicial review of Section 5 preclearance. Appellants do not rely on any of these cases in their brief.

The first case is *Evers v. State Board of Election Commissioners*.[81] Although the *Evers* court was not presented with, and did not decide, the question of reviewability *per se*, it did, in effect, hold that the Attorney General had acted improperly in failing to take action either objecting or affirmatively stating "no objection" to the voting change there challenged. The reason for the decision is not clear, but it seems to rest on one of two rationales: the court felt (1) that the Attorney General must take action either objecting or not objecting within the sixty days; or it felt (2) that the Attorney General must make a substantive finding that the voting change is either discriminatory or nondiscriminatory. Insofar as the decision rests on the first rationale, it is questionable under the explicit language of Section 5 which permits the Attorney General to take no

[79] *Id.* at n. 16.

[80] In a fourth case, *Harris v. Levi*, 416 F. Supp. 211 (D. D. C. 1976), appeal docketed, 9/2/76, No. 76-1823 (D. C. Cir. 1976), the District Court was bound by the Court of Appeals decision in *Harper II*, and thus was not free to consider the question of APA reviewability on its own. The remarkable feature of the *Harris* case, however, is the District Court's dismissal of three counts of the complaint on the ground that the Attorney General's preclearance decision was not reviewable under the APA. Count three is specially interesting because it alleged that the Attorney General's decision not to object was based on a legal standard of review (the one man, one vote principle) that is not embodied in Section 5. In *Harper II* the plaintiffs also alleged that the Attorney General's decision not to object was based on a legal standard of review (deference to a court decision) that is not embodied in Section 5. Under the *Harris* holding the "deference" standard would be substantive, and, therefore, not subject to APA review. See 416 F. Supp. at 215, n. 3.

[81] 327 F. Supp. 640 (S. D. Miss. 1971), appeal dismissed for failure timely to docket, 405 U. S. 1001 (1972).

action on a submission.[82] Insofar as it rests on the second rationale, it is questionable in light of this Court's subsequent opinion in *Georgia* which indicates that the Attorney General need not adopt a standard of Section 5 review that requires an affirmative finding, one way or the other, on the question of discrimination. *Evers* has not been generally followed by the lower federal courts and is rarely cited in other cases.[83]

The second case is *Perkins v. Kleindienst.*[84] *Perkins* involved a challenge to certain voting changes in Canton, Mississippi. Following this Court's decision in *Perkins v. Matthews,*[85] the changes were submitted to the Attorney General for Section 5 preclearance. After considering the submission, the Attorney General indicated that he would not object to the changes. Perkins and others then brought suit under the APA seeking review of the Attorney General's decision. They alleged in their complaint that the Attorney General failed to make a determination, as required by Section 5, of whether the voting changes had a discriminatory purpose or effect.[86] They further alleged that the Attorney General had misinterpreted the evidence before him and that this misinterpretation constituted an "error of law" under Section 5.[87] On the basis of these allegations they asked the District Court to "remand" the case to the Attorney General "for a reasoned decision . . . that will accord with the law" and to retain jurisdiction to review the new decision after remand.[88] The District Court

[82] See *supra*, 38.

[83] *Harper v. Kleindienst* is the notable exception. See 362 F. Supp. at 745.

[84] Civil Action No. 1309-72 (D. D. C. Nov. 2, 1972) (unreported). The order is reprinted in full in Appendix E, *infra*. *Perkins* was also relied on by the *Harper II* district court. See 362 F. Supp. at 745.

[85] 400 U. S. 379 (1971).

[86] *Perkins v. Kleindienst*, Civil Action No. 1309-72 (D. D. C. 1972).

[86] Complaint Para. 23, 24, *Perkins v. Kleindienst*, Civil Action No. 1309-72 (D. D. C. 1972). The complaint is reprinted in full in Appendix F, *infra*.

[87] *Id.*, Para. 25.

[88] *Id.*, Para. 29.

obliged by ordering the Attorney General to make "a reasoned decision in conformity with the requirements of Section 5 of the Voting Rights Act" and went on to require the new decision to include "specific findings and conclusions as to the discriminatory effect" of the challenged voting changes.[89] In *Perkins,* as in *Evers,* the question of reviewability was not discussed *per se,* although the court, in effect, reviewed the Attorney General's action under Section 5. Again the rationale for the decision is not clear, although the *Perkins* order suggests that Section 5 requires the Attorney General to make a substantive finding that the voting change is discriminatory or nondiscriminatory. For the reasons already stated, such a holding is questionable in light of this Court's decision in *Georgia.*

The third case, *Robinson v. Pottinger,*[90] involved a change to a mayor-council form of government in Montgomery, Alabama. This change was submitted to the Attorney General pursuant to Section 5. In his response to the submission the Attorney General stated that he did not object to the change under Section 5, but went on to comment that requirement of qualifying fees for candidates possibly violated the equal protection rights of those unable to pay them. In consequence, the submitting authorities brought a declaratory judgment action to remove the "cloud" of doubtful constitutionality created by the Attorney General's gratuitous remarks, joining him and the Assistant Attorney General for Civil Rights as defendants. The Attorney General moved to be dismissed as a party defendant, apparently on the ground, *inter alia,* that his unnecessary remarks did not affect the enforcement of the

[89] See Appendix E, *infra* 18a. The court's order in *Perkins* does not specify why the Attorney General's initial decision not to object was not "in conformity with the requirements of Section 5." Ironically, the District Court failed to set forth its own "findings and conclusions" concerning the Attorney General's actions in the case.

[90] 376 F. Supp. 615 (M.D. Ala. 1974), aff'd, 512 F. 2d 775 (5th Cir. 1975).

statute so that no actual case or controversy existed between him and the Montgomery officials. The District Court held that the Attorney General was a proper party because the plaintiffs were persons "adversely affected by agency action" within the meaning of the APA.[91] The case is a curious one, because the Attorney General's preclearance decision was not being brought into question. The District Court also stated that:

> Other than the correction of the alleged interference, *no direct relief is sought—nor can it be sought* —against the Attorney General and his Assistant.[92]

Thus, the case would appear to be no authority for the proposition that the Attorney General's preclearance decisions may be challenged in injunctive suits brought under the APA. Such decisions remain matters committed to agency discretion by law for purposes of APA review.

D

To permit APA review would be to authorize collateral attack against judgments entered by courts in the very 15th Amendment suits that Congress sought to preserve under Section 5.

"Collateral attack" may be defined as an attempt to avoid, defeat, or evade the effect of a judicial proceeding by means of some incidental proceeding not provided by law for the express purpose of attacking it.[93] If, as the Court of Appeals held in *Harper II*,[94] a party may litigate an Attorney General's non-objection at any time after the sixty-day period has run and subsequently force the Attorney General to enter an objection, as he in effect was ordered to do

[91] 5 U. S. C. § 702.
[92] 376 F. Supp. 618 (emphasis added).
[93] *United Merchants & Mfgrs., Inc. v. South Carolina Electric & Gas Co.*, 113 F. Supp. 257, 262 (D. S. C. 1953); *Trustees of Somerset Academy v. Picher*, 90 F. 2d 741, 744 (1st Cir. 1937).
[94] 520 F. 2d at 60-61.

by the *Harper II* District Court,[95] then a party who unsuccessfully attacks a voting change in a traditional Fifteenth Amendment suit would be provided a ready means of avoiding the outcome of a judicial proceeding which he himself instigated and by which, as a party litigant, he ought, under normal principles of adjudication, to be bound. This is no hypothetical argument, since that is exactly what happened in this case.

Rather than pursuing his appeal from the *Harper I* decision, as he ought to have done, Harper instituted the *Harper II* suit to attack the Attorney General's non-objection and to force an objection to the Senate Plan. This was nothing more than a clever method of evading the consequences of the District Court's judgment in *Harper I* and also the risk that the judgment would be affirmed on appeal by this Court. Since Congress intended that parties who disagree with the Attorney General's non-objection should seek their remedies in Fifteenth Amendment suits, to allow this novel form of collateral attack in lieu of appeal would nullify the statutory scheme.

Under the rule in *Harper II* it would make no difference whether the Fifteenth Amendment suit had been instituted by the private parties before the Attorney General's non-objection was entered or after. An example will illustrate this point. In 1971, South Carolina submitted a change in the method of electing the Lee County Council to the Attorney General for Section 5 review.[96] The Attorney General responded by stating that he would not interpose objection to the change.[97] He gave no reasons or reasoning for his decision. Subsequently, a private party suit was initiated seeking an injunction against the change on

[95] 362 F. Supp. at 746.
[96] See Letter of Dec. 17, 1971, from David L. Norman to James H. Quackenbush, Jr., R., Document No. 5.
[97] *Id.*

Fifteenth Amendment grounds. The District Court held that the change was not racially discriminatory.[98]

If *Harper II* is good law, those same Lee County plaintiffs could now go to the District of Columbia and institute an action under the APA, alleging that the Attorney General's non-objection was in violation of his legal duty under Section 5. They could claim that he did not give a "reasoned decision" and therefore failed to exercise his independent judgment on the voting change. They could claim that his decision was based on an erroneous legal standard, for instance, failure to apply the correct burden of proof (rather than deference to a court decision). Such a claim would not be entirely frivolous, since by the Justice Department's own admission

> . . . § 5 was little used prior to 1969 and . . . the Department of Justice questioned its workability. Not until after the Supreme Court, in litigation brought under § 5 had begun to define the scope of § 5 . . . did the Department begin to develop standards and procedures for enforcing § 5.[99]

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[98] *Lloyd v. Alexander*, Civil Action No. 74-291 (D. S. C. Mar. 31, 1976) (unreported), appeal docketed 6/15/76, No. 76-1645 (4th Cir. 1976).

[99] Statement of J. Stanley Pottinger, *Hearings on H. R. 939 . . . Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee*, 94th Cong., 1st Sess., Ser. No. 1, pt. 1, 169 (1975). This statement was corroborated by the testimony of Gerald W. Jones, Chief of the Voting Section of the Justice Department, in his deposition. Referring to Section 5 review prior to the implementation of the present submission procedures in September, 1971, Mr. Jones testified as follows:

> A. . . . I would not be able to say that any particular given standard was used at that time. As a matter of fact, that was one of the reasons for—that led up to the creation of the administrative procedure, so that there would be articulated consistent procedures that would govern the administration of the Section 5 evaluation process.
>
> Q. Are you saying there were no standards used at that time, that the department itself had no standards that it applied consistently and uniformly?
>
> A. None that I was aware of, except to the extent of making a judgment as to whether or not the change had the potential of racial discrimination. *(cont.)*
>
> * * * *

Thus, it would be possible to claim that the Attorney General had not performed his statutory duty and to seek a court order requiring him to object, as was done in *Harper II*. The adverse adjudication in the Fifteenth Amendment action could thereby be evaded and ignored.

Such a procedure is not only an affront to the conventional theory of adjudication and appellate review; it would also mean that the State could never rely on the finality and binding effect of a judicial decision permitting it to enforce a voting change. Indeed, one need not posit a judicial decision in the illustration, since a plaintiff could simply short-circuit the Section 5 scheme altogether and bring the Administrative Procedure Act suit without bothering to bring a traditional action first. [100] This would create a par-

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[99] *(cont.)* Q. Prior to the effective date of the present Section 5 submission procedures, was there any particular type of data the department required submitting authorities to send along with submissions?

A. As far as I can recall, it was strictly an ad hoc thing, that whoever was reviewing a particular submission used his own judgment as to what information he would need and sought to get it.

No, no rules at all that I am aware of. (A. 30-31.)

James P. Turner, the Deputy Assistant General for the Civil Rights Division, likewise testified:

> [V]irtually all of the time and resources the Division had across the board were consumed in designating counties for examiners, servicing those examiners, setting up forms for examiners and observers to use, instructing observers, selecting places where observers were to go. It was pretty much a year-round project. During that period [1965-1967], Section 5 just did not get any significant attention.
>
> * * * *
>
> [W]e did change the approach from one which was essentially where we set out to find out whether or not there was discrimination, to one where . . . the submitting authority was required to . . . prove the [absence] of discrimination.
>
> * * * *
>
> Q. Would it be accurate to say that prior to the subject date of the new procedures [28 C. F. R. § 51 et seq.] . . . that objection was interposed only in those cases where the Department had reached the conclusion that the effect of the change would be in some way to be to abridge or deny voting rights of minorities?
>
> A. I think that is generally accurate. (A. 43-44.)

[100] Judge MacKinnon recognized this point in *Harper II:* "The majority has taken the first step to developing a means of judicial review which could ultimately supplant the 'subsequent action to enjoin enforcement' which Congress so carefully preserved in Section 5." 520 F. 2d at 74.

ticularly acute problem for South Carolina, since it was the only State that consistently submitted its voting changes before 1971,[101] the period when it could most plausibly be contended that the Attorney General's failure to object or give a "reasoned decision" constituted a breach of his Section 5 duty.

E

A single judge acting under the APA has no jurisdiction to determine questions arising under Section 5, which Congress has mandated "shall be determined by a court of three judges."

In *Allen v. State Board of Elections,*[102] this Court was called upon to construe that portion of Section 5 providing that

> Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of Section 2284 of Title 28.

The Court did so in the following language:

> As we have interpreted § 5, suits involving the section may be brought in at least three ways. First, of course, the State may institute a declaratory judgment action. Second, an individual may bring a suit for declaratory judgment and injunctive relief, claiming that a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny. Third, the Attorney General may bring an injunctive action to prohibit the enforcement of a new regulation because of the State's failure to obtain approval under § 5. All

[101] "[O]nly South Carolina has complied rigorously with § 5. Through June, 1969, it submitted 252 changes for approval, including all three annexations (and one consolidation) that were approved by the state legislature between 1965 and 1969." *Perkins v. Matthews,* 400 U. S. 379, 393, n. 11 (1971) (per Brennan, J.). Through 1970 South Carolina submitted approximately 441 changes to the Attorney General. In approximately 164 cases the Attorney General made no response to the submission within the sixty day period. *Hearings on H. R. 939 . . . Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee,* 94th Cong., 1st Sess., Ser. No. 1, pt. 1, 537 (1975).

[102] 393 U. S. 544 (1969).

> these suits may be viewed as being brought "under" § 5. The issue is whether the language "under this section" should be interpreted as authorizing a three-judge action in these suits.[103]

Noting that statutes providing for three-judge courts must be strictly construed, the Court went on to say:

> . . . Notwithstanding the problems for judicial administration, Congress has determined that three-judge courts are desirable in a number of circumstances involving confrontations between state and federal power or in circumstances involving a potential for substantial interference with government administration. The Voting Rights Act of 1965 is an example. Federal supervision over the enforcement of state legislation always poses difficult problems for our federal system. The problems are especially difficult when the enforcement of state enactments may be enjoined and state election procedures suspended because the State has failed to comply with a federal approval procedure.
>
> In drafting § 5, Congress apparently concluded that if the governing authorities of a State differ with the Attorney General of the United States concerning the purpose or effect of a change in voting procedures, it is inappropriate to have that difference resolved by a single district judge. The clash between federal and state power and the potential disruption to state government are apparent. There is no less a clash and potential for disruption when the disagreement concerns whether a state enactment is subject to § 5. The result of both suits can be an injunction prohibiting the State from enforcing its election laws. Although a suit brought by the individual citizen may not involve the same federal-state confrontation, the potential for disruption of state election procedures remains.[104]

[103] *Id.* at 561.

[104] *Id.* at 562-563.

Since the Court's decision in *Allen,* Congress has had two opportunities to modify the three-judge court requirement of Section 5. But in both 1970 and 1975 Congress left the requirement unchanged. Moreover, when Congress repealed the general three-judge court statute in 1976, it was careful to preserve the three-judge court requirement in cases involving statewide reapportionment and cases dealing with Section 5 of the Voting Rights Act.[105]

The Congressional command that Section 5 questions be decided by a court of three judges would be violated if the Attorney General's Section 5 preclearance decisions could be called into question before a single judge under the APA. *Harper II* itself demonstrates this. In the language of *Allen, Harper II* was a suit brought by an individual "for declaratory and injunctive relief, claiming that a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny." The complaint in *Harper II* expressly alleged that the Senate Plan was covered by Section 5[106] and that the Attorney General "failed to make the determinations *required under Section 5 of the Voting Rights Act.*"[107] Likewise, the *Harper II* District Court stated:

> The *sole* issue in this case is whether the Attorney General has fulfilled his duties *under Section 5 of the Voting Rights Act.*[108]

As both the plaintiffs and the judge recognized, the resolution of the issue in *Harper II* necessarily involved the District Court in determination of the scope, meaning, and application of Section 5. A single judge, acting under the APA, had no jurisdiction to decide such a case.

In *United States v. Cohan,*[109] the Fifth Circuit Court of Appeals had before it a case in which a single-judge district court had decided a question substantially similar to that in *Harper II, i.e.,* whether the Attorney General was required to justify a Section 5 objection by giving a "reasoned decision." It was argued that single-judge jurisdiction was appropriate because an injunction was not being sought against a statewide enactment. The Court of Appeals held that it had no jurisdiction to hear the appeal from the single judge's determination, since under *Allen* the initial questions concerning the requirements of Section 5 should have been determined by a three-judge court.

Similarly, in *Sumter County Democratic Executive Committee v. Dearman,*[110] which concerned the seemingly trivial shift in certification of names of party candidates for the general election ballot from certification by the local executive committee chairman to certification by the committee secretary, a single district judge refused to grant relief and the plaintiffs appealed. The District Court had not passed on the merits of whether the change in certification procedure was discriminatory, but found only that the executive committee had delegated authority to certify to the secretary. In remanding the case for the convening of a three-judge district court, the Court of Appeals observed:

> The teaching of *Allen* is clear. Congress has mandated "the disputes involving the coverage of § 5 be determined by a district court of three judges."[111]

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[105] See P. L. 94-381, 90 STAT. 1119 (1976). Section 3 of the statute amends 28 U. S. C. § 2284(a) to preserve three-judge jurisdiction in statewide reapportionment suits. The legislative history of the statute makes clear that the three-judge requirement is also to be retained in Section 5 suits. See, *e. g.,* S. Rep. No. 204, 94th Cong., 1st Sess., 9 (1975): "Three-judge courts would continue to be required . . . in cases under the Voting Rights Act of 1965, 42 U. S. C. section . . . 1973c [Section 5] . . ." See also 122 CONG. REC. H8144-45 (Daily ed. Aug. 2, 1976) (Mr. Railsback).

[106] Complaint, Para. 18, A. 22.

[107] *Id.,* Para. 21, A. 23 (emphasis added).

[108] 362 F. Supp. at 744 (emphasis added).

[109] 470 F. 2d 503 (5th Cir. 1972).

[110] 514 F. 2d 1168 (5th Cir. 1975).

[111] *Id.* at 1170 (citation omitted.)

In *Harper II* the question of three-judge jurisdiction was raised for the first time on appeal. Unlike the Court of Appeals for the Fifth Circuit in the cases just cited, the Court of Appeals for the District of Columbia Circuit upheld single-judge jurisdiction. It reasoned that *Allen* did not apply because a suit against the Attorney General under the APA could not be "equate[d] to a single-judge decision on the merits of the Section 5 issues posed by a submission."[112] The Court of Appeals thus implied that a three-judge court is required only when the court is asked to pass on the merits of the discriminatory purpose and effect of a voting change, which it was not being asked to do in *Harper II*. But such reasoning is contrary to the teaching of *Allen* that all questions arising under Section 5, not merely questions on the merits of a voting change, are to be decided by a court of three judges.

The Court of Appeals also attempted to distinguish *Allen* on the ground that it involved a suit for an injunction against a state law which "portended disruption of state processes designed for its administration,"[113] while *Harper II* sought an injunction only against the Attorney General. The Court of Appeals conceded, however, that the ultimate effect of the APA suit would be to "generate 'a potential for substantial interference with government administration,'"[114] thus contradicting its own reasoning. It dismissed this disruption as being "no greater than any instance in which the Attorney General on state's request executes the function assigned by Section 5,"[115] an argument that ignored the fact that the State had already obtained successful preclearance of the Senate Plan.[116]

[112] 520 F. 2d at 63.
[113] 520 F. 2d at 63.
[114] *Id.* at 64.
[115] *Id.*

Finally, the Court of Appeals reasoned that single-judge jurisdiction was proper because

> The Supreme Court has frequently cautioned that statutory provisions summoning three-judge federal district courts are to be strictly construed. This canon is to be observed, as scrupulously as elsewhere, with respect to calls of that nature in the Voting Rights Act.[117]

Of course, the teaching of *Allen* is exactly the opposite of that stated in the quotation. After noting that the normal rule is to construe three-judge statutes strictly, this Court elaborated in *Allen* on the extradordinary nature of Section 5 and construed its three-judge provision broadly. Congress has also made it clear, by carefully preserving three-judge courts under Section 5 while repealing the requirement in most other cases, that the canon of strict construction is *not* to be observed, "as scrupulously as elsewhere," with respect to Section 5 cases.

III

The Attorney General did not abuse his discretion by deferring to a judicial determination that the Senate Plan does not abridge the rights of black voters in South Carolina.

Assuming, *arguendo,* that the Attorney General's decision not to object to the Senate Plan was reviewable and that a three-judge court was not required for that purpose, the judgment below ought nevertheless to be affirmed.

[116] One reason a suit like *Harper II* will be initiated is that the State has successfully obtained preclearance. In all such cases, the potential for disruption of orderly enforcement of voting, changes will be greater as a result of the suit, because the potential for suspension of the State law under Section 5 has been removed by successful preclearance.
[117] 520 F. 2d at 63 (footnotes omitted).

When the Senate Plan was submitted to the Attorney General, he had voluminous information before him with which to evaluate the Plan.[118] He had just recently studied the 1971 Plans in detail on the basis of the same information. As to those previous plans he had reached no affirmative conclusion that they were racially discriminatory, but had simply been

> *unable to conclude* . . . that either proposed Plan A or Plan B will not have the effect of abridging the right of black citizens of South Carolina to vote on account of race or color.[119]

Thus the situation was one in which the evidence was in equipoise and the Attorney General was unable to reach an affirmative conclusion.

Shortly thereafter the Attorney General was called upon to evaluate the Senate Plan on the basis of the same detailed information. The Attorney General studied the Senate Plan for seven weeks before reaching a decision. However, in addition to the information previously before him, the Attorney General also had available, after May 23, 1972, the opinion of the *Harper I* court that the Senate Plan satisfied the requirements of the Fifteenth Amendment. The Attorney General, after evaluating the Senate Plan for seven weeks, decided to defer to the decision in *Harper I* and on that basis stated that he would interpose no objection to the Plan.[120]

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[118] See Defendants' Motion to Dismiss of October 16, 1972, *Harper v. Kleindienst*, Civil Action No. 1607-72 (D. D. C. 1972), Appendix A, *infra*, at 2a.

[119] Letter of March 6, 1972, from David L. Norman to Daniel R. McLeod, A. 26. (Emphasis added.)

[120] No new information was submitted to the Attorney General a year later when he was reviewing the Plan pursuant to the *Harper II* court order. After this court-ordered review the Attorney General concluded for the first time that the Plan had a racially discriminatory effect. See Br. App., Appendix B, 8a. However, this conclusion was based upon the "possible" discriminatory effect of multimember districts rather than any evidence of *actual* discriminatory effect, upon the *(cont.)*

A

It was within the Attorney General's discretion to consider a judicial finding that was relevant to a matter before him.

As we have already observed,[121] this Court in *Georgia* found that Section 5 does not specify how the Attorney General is to perform his preclearance function. It is not necessary to find that the way in which the Attorney General discharged his Section 5 duty was his only possible choice in order to find that he was acting reasonably within the scope of his discretion. Thus, it does not follow from the proposition that it may have been legally permissible for the Attorney General to reach his decision without regard to the *Harper I* case, that the Attorney General was incorrect to consider the finding of nondiscrimination in *Harper I* and, in weighing it against the other evidence before him, to give it controlling weight.[122]

Since the substantive standards of the Fifteenth Amendment are explicitly incorporated into Section 5 of the Voting Rights Act,[123] it could hardly be deemed arbitrary for the Attorney General to consider the Fifteenth Amend-

---

[120] *(cont.)* fact that South Carolina had a "white" primmary until 1947, and upon the fact that it would be statistically possible to draw a single-member districting plan containing "four or five election districts with black population majorities." *Id.* 6a-8a. In view of this Court's decisions in *City of Richmond v. United States*, 422 U. S. 358 (1975), and *Beer v. United States*, 425 U. S. 130 (1976), it is doubtful that the Attorney General's basis for objection is legally correct.

[121] *Supra*, 37 at n. 68 and accompanying text.

[122] A serious objection to the order in *Harper II* directing the Attorney General not to consider the *Harper* I finding in making his determination is that this Court in *Georgia* held that it was within the Attorney General's discretion to determine what information he would need to consider in passing on a submission. *Georgia v. United States*, 411 U. S. at 539-40. Thus, despite all claims to the contrary in *Harper II*, the District Judge was injecting herself into the Attorney General's decision making process and assuming his Section 5 function of deciding what evidence to consider.

[123] *South Carolina v. Katzenbach*, 383 U. S. 301, 308-315 (1966); *Allen v. State Board of Elections*, 393 U. S. 544, 589 (1969) (Harlan, J., concurring in part and dissenting in part); *City of Richmond v. United States*, 422 U. S. 358 (1975).

ment finding of the *Harper I* Court. It is this very congruence of the substantive standard under the Amendment and the Act that led this Court in *Connor v. Johnson,* [124] to hold unanimously that judicially fashioned voting changes need not be submitted to the Attorney General under Section 5. Since both the *Harper I* court and the Attorney General were concerned with whether the Senate Plan would deny or abridge the right to vote on account of race or color, the court's finding on the matter was relevant information which the Attorney General could consider. Conceivably, as a result of discovery under the Federal Rules of Civil Procedure, evidence would be presented to the District Court which the Attorney General did not have before him. Conceivably, in the adversary context of litigation, the arguments for and against the Senate Plan would be more fully developed and the issues more sharply drawn than they would be in the cold submission record before the Attorney General. There was nothing, therefore, which was unreasonable about his considering the *Harper I* finding in making his own determination not to object.

B

The Attorney General's decision to defer to a judicial determination that the Senate Plan is not discriminatory rested on a policy implicity approved by this Court and was not an abuse of his discretion.

In addition, there was a substantial legal reason why the Attorney General might decide that deference to the *Harper I* court was proper. In the *Allen* case, this Court was presented with the argument that if Section 5 were construed to cover reapportionment plans a conflict between the executive and judicial branches would be built into the Voting Rights Act. The Court noted the potential for friction, but did not reach the question, as it was hypothetical on the facts of the case. [125] In *Georgia v. United States,* the same argument was again presented. [126] However, by that time the Attorney General had adopted administrative procedures, including a procedure of deferring to federal court decisions in litigation over changes which had also been submitted for preclearance. In his brief, then Solicitor General Griswold specifically mentioned these procedures in response to the State's argument on the point.[127] In its opinion, the Court reasoned that in view of the Attorney General's procedures, the problem foreshadowed in *Allen* had failed to materialize.

> Where a plan has been submitted to the Attorney General and is at the same time being litigated with respect to a Fifteenth Amendment claim the Attorney General has deferred to the judicial determination regarding racial discrimination.[128]

Thus, this Court implicitly approved deferral as a reasonable exercise of the Attorney General's discretion in administering Section 5.

Appellants argue that this Court's opinion in *Connor v. Waller,*[129] shows that the Attorney General should not have deferred to the decision in *Harper I.*[130] However, this Court was not laying down any broad new principle of law in *Waller.* On the contrary, it would appear that the holding therein was applicable only to the very unusual situation presented by that appeal. *Waller* was the third appeal to come up to this Court from the protracted litigation over legislative reapportionment in *Mississippi.*[131] In its order

[124] 402 U. S. 690 (1971).

[125] *Allen,* 393 U. S. at 569.
[126] 411 U. S. 534 at n. 6.
[127] See *Allen v. State Board of Elections,* Brief for the United States, at 25-27.
[128] *Georgia v. United States,* 411 U. S. 535 at n.6.
[129] 421 U. S. 656 (1975).
[130] Br. App. 21, n. 25.
[131] The history of the litigation is outlined in *Connor v. Coleman,* 425 U. S. 675 (1976).

of May 22, 1975, from which appeal was being taken, the Mississippi District Court held that two legislatively enacted reapportionment plans did not have to be submitted to the Attorney General for Section 5 preclearance and had authorized their use in the upcoming elections. The District Court's holding that the reapportionment plans were not covered by Section 5 was clearly erroneous in view of this Court's decision in *Georgia v. United States*.[132] With the 1975 primary elections only a few weeks away, the case reached this Court. The State of Mississippi did not file a brief on the merits.[133] No argument was heard by the Court. In a short *per curiam* opinion the Court reversed the May 22d order of the District Court, stating that the legislatively enacted reapportionment plans

> are not now and will not be effective as laws until and unless cleared pursuant to § 5.[134]

We interpret the additional holding of the Court that it was error to have given constitutional approval to the plans as a caution to the District Court not to order them into effect on its own motion as interim plans for the 1975 elections. This interpretation makes sense when one considers the prior history of the litigation from *Connor v. Johnson* onward. It is also reinforced by the last paragraph of the *per curiam* opinion and by Mr. Justice Marshall's concurrence, both of which indicate that the Court foresaw that because of the imminence of the elections there might be an attempt to implement the two plans by court order before preclearance was obtained. This, and no more, seems to have been the ruling in *Waller*. Since South Carolina has

[132] 411 U. S. 526 (1973).

[133] The Attorney General of Mississippi did file a memorandum response to certain questions propounded by the Court. See Memorandum Brief of Appellees on the Applicability of Section 5 of the Voting Rights Act of 1965, as amended, 42 U. S. C. § 1973c, filed June 2, 1975. The Court consolidated consideration on the stay motion with consideration on the merits.

[134] 421 U. S. at 656.

never sought to evade the requirements of Section 5 under color of a court order, or otherwise, *Waller* can have no application to this case.

The State of South Carolina is the only covered jurisdiction that has complied with Section 5 of the Voting Rights Act from the beginning. In obedience to that statute it submitted the Senate Plan to the Attorney General and was successful in obtaining preclearance. Preclearance came not as a result of any stratagem on the part of the State, but as a result of a decision made by the Attorney General in the exercise of his discretion under Section 5. That decision was within the scope of his authority to make. It was not unreasonable or arbitrary. To hold now that the Senate Plan can no longer be enforced would be to disrupt the process by which the people of South Carolina elect their representatives in one chamber of the General Assembly. It would deprive those who have been duly elected of the offices to which the people have called them. It would interrupt the conduct of orderly government in the legislative branch. Such consequences should not be visited on South Carolina and its citizens merely because appellants are dissatisfied that the Senate Plan was precleared. They have a proper judicial forum for litigating their claims if they desire to do so. Appellants no less than South Carolina should obey the requirements of Section 5.

CONCLUSION

For all the reasons stated above, the judgment of the District Court should be affirmed.

Respectfully submitted,

DANIEL R. McLEOD,
Attorney General
Post Office Box 11549.
Columbia, South Carolina 29211,

RANDALL T. BELL,
University of South Carolina School
of Law,
Columbia, South Carolina 29208,
Attorneys for Appellees.

Of Counsel:
TREVA G. ASHWORTH
KENNETH L. CHILDS
KATHERINE W. HILL
Assistant Attorneys General,

JAMES P. FIELDS,
Senate Judiciary Committee,
South Carolina Senate.

APPENDICES

APPENDIX A

Defendants' Motion to Dismiss of October 16, 1972, *Harper v. Kliendienst,* C. A. No. 1607-72 (D. D. C. 1972).

[Caption omitted in printing] .

MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants, by their undersigned attorneys, pursuant to Rule 12(b) (1), (6) and (7), of the Federal Rules of Civil Procedure, hereby move to dismiss the above-entitled action on the grounds that the Court lacks jurisdiction over the subject matter of the action; the Complaint fails to state a claim upon which relief can be granted; and plaintiffs have failed to join parties who are indispensable to the action under Rule 19 of the Federal Rules of Civil Procedure. Alternatively, defendants move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

In support of this Motion, the Court is respectfully referred to the affidavit of Assistant Attorney General Norman, attached hereto and to the Statement of Material Facts as to which there is no genuine issue and the Memorandum in Support of Defendants' Motion, filed herewith.

Respectfully submitted,

HARLINGTON WOOD, JR.,
Assistant Attorney General,

HAROLD H. TITUS, JR.,
United States Attorney,

HARLAND F. LEATHERS,
JEFFREY AXELRAD,
Attorneys, Department of Justice,
Attorneys for Defendants.

AFFIDAVIT

CITY OF WASHINGTON
DISTRICT OF COLUMBIA } SS

DAVID L. NORMAN, being first duly sworn, deposes and says:

1. I am the Assistant Attorney General in charge of the Civil Rights Division of the Department of Justice.

2. The records of the Department of Justice reflect that on May 12, 1972, the Department of Justice received from the Office of the Attorney General of South Carolina a copy of Act 1205 (S2-25) and supporting information submitted pursuant to Section 5 of the Voting Rights Act of 1965. Said Act relates to the reapportionment of the South Carolina State Senate. In addition, Section 3 of the Act provides for numbered seats in the South Carolina House of Representatives. A copy of the letter is attached as Exhibit A.

3. Pursuant to the Department of Justice Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 CFR 51, personnel of the Civil Rights Division of the Department of Justice made a preliminary review and determined that Act 1205 and the information submitted on May 12, 1972, along with information in our files obtained in the course of the Department's consideration of a previously submitted reapportionment plan, constituted a complete submission as defined in the published guidelines (28 CFR 51.10). Pursuant to the guidelines (28 CFR 51.22) expedited consideration of the submission was requested by the State of South Carolina to enable it to meet its election timetable.

4. By letter dated June 30, on behalf of the Attorney General, I informed the South Carolina Attorney General that no objection would be interposed to the implementation of the Senate reapportionment plan contained in Act 1205, but that an objection was being made to the implementation of Section 3 of Act 1205 (numbered seats in the House). A copy of that letter is attached as Exhibit B.

5. On May 30, 1972, the Department received from the South Carolina Attorney General a copy of Act 1204, an act relating to the use of numbered seats in all multi-member elective bodies in the State of South Carolina.

Pursuant to the published guidelines, expedited consideration of Act 1204 was requested by the State in view of upcoming elections. After a preliminary review indicated that additional information was needed, a request for the necessary additional information was made (see letter of June 16, 1972, copy attached as Exhibit B-1). Additional information was received on June 5, 9, 12, and 19, 1972. By my letter dated June 19, 1972, the Department of Justice acknowledged that it had sufficient information to review Act 1204. A copy of that letter is attached as Exhibit C.

/s/ DAVID L. NORMAN,
Assistant Attorney General,
Civil Rights Division.

Sworn to and subscribed
before me this 19th
day of September 1972.

/s/ VALERIE PRATHER,
Notary Public.

My commission expires: January 31, 1977.

[Exhibits omitted in printing]

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. Act 1205 of the General Assembly of South Carolina was submitted to the Attorney General by letter from the Attorney General in South Carolina dated May 9, 1972, received by the Department of Justice on May 12, 1972.

2. The Justice Department determined that the May 12, 1972 submission was complete.

3. On June 30, 1972 the Assistant Attorney General in charge of the Civil Rights Division, on behalf of the Attorney General informed the South Carolina Attorney General that no objection would be interposed to the implementations of the Senate reapportionment plan contained in Act 1205.

Respectfully submitted,

HARLINGTON WOOD, JR.,
Assistant Attorney General,

HAROLD H. TITUS, JR.,
United States Attorney,

HARLAND F. LEATHERS.

[Certificate of service omitted in printing]

APPENDIX B

Exhibit No. 1 to Deposition of James P. Turner.

Memorandum for the United States of February 1, 1972, *McCollum v. West,* C. A. No. 71-1211 (D. S. C. 1972).

[Caption omitted in printing]

MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to this Court's request of December 30, 1971.

I. STATEMENT

On November 11, 1971, the State of South Carolina reapportioned its State Senate. On the same day two actions were filed in the United States District Court for the District of South Carolina attacking the new reapportionment statute. Both suits, *Twiggs v. West,* Civil Action No. 71-1106, and *McLeod v. West,* Civil Action No. 71-1123, allege that the reapportionment violates the Fourteenth Amendment one-man one-vote mandate. The plaintiff in *Twiggs* requested a three-judge district court pursuant to 28 U. S. C. § 2281, *et seq.*

On December 7, 1971, a third suit attacking the reapportionment was filed in the District Court for the District for South Carolina. This suit, *McCollum v. West,* Civil Action No. 71-1211, also attacked the South Carolina statute on the one-man one-vote Fourteenth Amendment basis but, in addition, alleged that the reapportionment violated rights of South Carolina black citizens guaranteed by the Fifteenth Amendment and Section 5 of the Voting Rights Act of 1965, as amended, 42 U. S. C. 1973c. The Fifteenth Amendment allegation in *McCollum* is that the reapportionment dilutes and cancels out the voting strength of cognizable racial minorities. *Complaint,* para. 11, p. 4. The Section 15 allegation in *McCollum* is that the State of South Carolina has neither obtained a declaratory judgement that the reapportionment is free of racial discrimination, nor has the statute been reviewed by the Attorney General and "found to be free of those violations for which the Voting Rights Act, 42 U. S. C. § 1973c was created." *Complaint,* para. 18, p. 5.

On November 19, 1971, the Attorney General of the State of South Carolina forwarded the reapportionment statute to the Attorney General of the United States. On December 29, 1971, pursuant to its guidelines for the submission of voting changes under Section 5 of the Voting Rights Act, (36 Fed. Register 18186, copy attached) the Department of Justice requested additional information necessary to make the submission complete (*Id.*, at page 18189, Section 51.18). The requested information was received in the Department on January 5, 1972, thus beginning the running of the 60-day period which the Attorney General has to make his determination. The deadline for the Attorney General to make his decision is March 6, 1972.

II. DISCUSSION

The questions upon which the Court desires the Attorney General to comment are:

1. "The jurisdiction of the District of South Carolina to proceed and determine any question arising under the Voting Rights Act of 1965, and related equal protection claims," and

2. "The apropriateness of this Court's proceeding to consider and determine any question arising under the doctrine of *Reynolds v. Sims* pending his (the Attorney General's) decision on the question submitted to him under the Voting Rights Act of 1965."

A. The Jurisdiction of the District of South Carolina, To Proceed and Determine Questions Arising Under the Voting Rights Act of 1965

Section 5 of the Voting Rights Act provides:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

Several litigable questions may arise under Section 5—whether a change is covered by Section 5; whether the enforcement of a change should be enjoined for failure of the state or subdivision to obtain approval under Section 5; or, of course, whether a declaratory judgment of the type described in the statute should be entered. See *South Carolina v. Katzenbach*, 383 U. S. 301 (1966); *Allen v. Board of Elections*, 393 U. S. 544 (1969); *Perkins v. Matthews*, 400 U. S. 379 (1971). It is our perception of the statutory scheme that the District Court with standard jurisdiction for litigation in the area has jurisdiction to decide whether the proposed change is one that affects voting within the meaning of the statute and is different from the procedures which were in effect on November 1, 1964, (*Perkins v. Matthews, supra*) and to determine whether the requirements of Section 5 have been met by the State of South Carolina. *Allen v. Board of Elections, supra*. However, in view of the fact that the State of South Carolina has made a formal submission in compliance with

Section 5 it would appear that these two issues are not present in these cases.

The ultimate issue under Section 5, and the one still remaining insofar as the instant cases are concerned, is whether the proscribed purpose and effect are absent so that the change in question may be rendered enforceable by declaratory judgment or the failure to interpose an objection. This, however, is the lone issue relegated by the statute to the District Court for the District of Columbia or the Attorney General. *Perkins v. Matthews, supra; Allen v. Board of Elections, supra.*

Under the statutory scheme an objection by the Attorney General would have the effect of continuing the unenforceability of the change, since changes in voting practices or procedures such as those envisioned by the South Carolina reapportionment may not be enforced unless and until the state or local jurisdiction obtains an appropriate declaratory judgment from the United States District Court for the District of Columbia or the change is submitted to the Attorney General and he does not object to its implementation within 60 days of submission.* See *Allen v. Board of Elections, supra; Dyer v. Love,* 307 F. Supp. 974 (N. D. Miss. 1969).

We note that the Fifteenth Amendment questions presented in the McCollum case would necessarily involve some of the same considerations as the Attorney General would have to make in reaching his determination under Section 5. For that reason, we suggest that the Court might well wish to await the Attorney General's determination before devoting its time to those issues. Other courts have taken that position in their consideration of like situations.

In *Bacote v. Carter,* Civil Action No. 15748 (N. D. Ga. 1971), a private plaintiff attacked a Congressional redistricting plan which had been submitted to the Attorney General by the State of Georgia. A three-judge District

* Language in *Connor v. Johnson,* 402 U. S. 690 (1971), in an order upon application for stay, suggests that reapportionment plans devised by a District Court are not subject to Section 5. However, there an effort was being made to require submission pursuant to Section 5 of a plan which the court had devised and ordered into effect whereas here the plan was devised by the legislature and in fact has been submitted pursuant to Section 5.

Court on December 22, 1971, determined that it would not proceed with the case until the review proceedings had been completed by the Attorney General.

In *Bussie v. McKeithen,** Civil Action No. 71-202 (E. D. La. 1971), a consolidated hearing of several private actions attacking the proposed reapportionment of the Louisiana State Legislature, the Court stayed its proceedings until the Attorney General had reviewed the proposed plan.

In *Howell v. Mahan,** Civil Action No. 105-71-N (E. D. Va., May 24, 1971), judges sitting in three related cases concerning a Virginia reapportionment plan retained jurisdiction, but postponed decision until such time as the proposed reapportionment plan was submitted to and reviewed by the Attorney General pursuant to Section 5.

Similarly, the Court in *Scott v. Burkes,* Civil Action No. 4989 (S. D. Miss. 1971), approved a county reapportionment plan on the condition that such plan, which was then under submission, not be objected to by the Attorney General pursuant to Section 5.

B. **The Appropriateness of the Court's Consideration and Determination of Questions Arising Under the Doctrine of** *Reynolds v. Sims*

There is no question that the Court has jurisdiction over issues concerning the apportionment of state legislatures. *Reynolds v. Sims,* 377 U. S. 533 (1964). All three of the private actions now before this Court contain allegations that the proposed plan of reapportionment violates the one-man one-vote principle of *Reynolds.*

Section 5 of the Voting Rights Act of 1965 is couched in terms of discrimination on account of race or color. The purely Fourteenth Amendment one-man-one-vote issues raised in the *Reynolds* case would therefore not provide a basis for the Attorney General interposing an objection under Section 5 unless those issues were such as would result in the denying or abridging of the right to vote on account of race or color. However, since the Attorney General's determination goes to the enforceability of the plan of reapportionment, we submit that it would be most appropriate for the Court to defer ruling on the *Reynolds*

* Copy attached.

v. Sims issues until the Attorney General has completed his review under Section 5. (See cases cited on page 7, *supra.*) The plan is presently under review and, while the Attorney General has until March 6 to make his determination, should the Court or the parties desire, the review will be expedited pursuant to Section 51.22 of the Department's Section 5 guidelines.

III. CONCLUSION

For the foregoing reasons the United States submits that it would be appropriate for the Court to exercise its discretion and defer ruling on the issues before it until the Attorney General review procedures provided by Section 5 have been completed.

Respectfully submitted,

DAVID L. NORMAN,
Assistant Attorney General.

JOHN K. GRISSO,
United States Attorney.

/s/ GERALD W. JONES,
ROBERT R. RUSH,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

[Attachments omitted in printing]

[Certificate of service omitted in printing]

APPENDIX C

Opinion and Order of October 4, 1971, *Vinik v. Smyth*, No. Civ. 71-89 TUC WEC (D. Ariz. 1971).

[Caption omitted in printing]

OPINION AND ORDER

No. Civ-71-89 TUC WEC

Before Trask, Circuit Judge, and Craig and Copple, District Judges.

CRAIG, D. J.

In this class action filed July 8, 1971, the plaintiffs sought declaratory and injunctive relief to restrain the defendants from enforcing certain sections of the Arizona Revised Statutes [1] which would cancel all voter registrations existing on the day following the General Election in 1970, and at intervals of 10 years thereafter, and from refusing the right to vote to persons otherwise qualified but who had not re-registered after the statutory cancellation. The restraint sought was to continue unless and until full compliance had been made with Section 5 of the Voting Rights Act of 1965, as amended (42 U. S. C. § 1973(c)).[2]

The action was instituted pursuant to Section 5 of the Act and other relevant sections, [3] and a three-judge court was empaneled to hear it.

The immediate relief sought by plaintiffs was a temporary restraining order to enjoin the enforcement of the Arizona Statute with respect to a primary election to be held September 21, 1971, by the City of Tucson, Arizona, a municipal corporation, located in Pima County. The temporary restraining order was denied by this court September 14, 1971.

The denial of the application for temporary restraining order was appealed to the United States Supreme Court by way of application to the Supreme Court for a stay order directed to the United States District Court for the District of Arizona denying temporary relief.

On September 20, 1971, Mr. Justice Stewart, for the Court, denied the application of plaintiffs herein, and further ordered that persons in Pima County, Arizona "who would have been eligible to vote, but for the passage of

Arizona Revised Statutes 16-150D, Laws of Arizona 1970, C.151, § 12, shall be allowed to vote in the September 21, 1971, primary election, provided that their ballots shall be segregated and impounded subject to a prompt hearing on the merits of the underlying issues and further order by the District Court."

The primary election in the City of Tucson was held September 21, 1971, and pursuant to the order of the Supreme Court of the United States, dated September 20, 1971, the prescribed ballots were segregated and impounded.

The matter came on for hearing before this court September 30, 1971, on the defendants' Motion to Dismiss and the plaintiffs' Motion for Summary Judgment with affidavits filed by both parties.

Prior to the filing of the present action the constitutionality of A. R. S. § 16-150D, as amended, had been attacked in a three-judge District Court, cause No. Civ. 70-352, Phx., entitled *Leola Johnson, et al., v. Paul N. Marston, County Recorder for Maricopa County, Arizona, et al.* The claim was that the Arizona statute deprived the plaintiffs in that case, and their class, of equal protection of the laws, privileges and immunities and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and on the further ground that the statute violated the due process clause of the Fifth Amendment to the Constitution of the United States.

By opinion and order of this court dated November 27, 1970, this court denied the relief sought by plaintiffs in that action, and upheld the constitutionality of the Arizona statute in question.

On March 22, 1971, in *Johnson v. Marston,* 401 U. S. 968, the Supreme Court of the United States affirmed the opinion and order of this court.

Five days after the decision in *Johnson v. Marston* became final, and on March 27, 1971, the Director of the Census published in the Federal Register, 36 Fed. Reg. 5809, his determination made pursuant to 42 U. S. C. § 1973 (b) (2) that less than 50 percent of the persons of voting age residing in Pima County and seven other counties, voted in the presidential election of November, 1968.[4]

The parties to this action, as well as the court, agree that the revision of the Arizona Statute under consideration falls within the scope of Section 5 of the Voting Rights Act of 1965, as amended, as to the eight covered counties. *Perkins v. Matthews,* 400 U. S. 379 (1971). The action is likewise not foreclosed by *Johnson v. Marston, supra.* That being so, the principal issue now before the court is whether "the chief legal officer or other official" of the State of Arizona has complied with the provisions of Section 5. *Perkins v. Matthews, supra; Allen v. State Board of Elections,* 393 U. S. 544 (1969).

On that issue the Attorney General of Arizona pursuant to the proviso of Section 5, *supra,* on July 8, 1971, under the authentication of the Secretary of State of the State of Arizona, submitted to the Attorney General of the United States, the text of Chapter 151 of the Laws of 1970 of the State of Arizona containing amendments to Title 16 of the Arizona Revised Statutes, including Section 16-150D, as amended, the validity of which is questioned in this action. The Attorney General of Arizona included in that formal submission, not only the text of Chapter 151, *supra,* as Exhibit A, but also, as Exhibit B, Title 16 in its entirety with the changes made by Chapter 151 marked thereon, and a certified copy of House Bill 4 which constituted the introduction of Chapter 151, together with House and Senate Amendments thereto and explanatory material concerning legislative history and procedure. The submission was voluminous and detailed. It was received by the Department of Justice on July 12, 1971. If the sixty day period for Justice Department examination began on July 12, it would have expired on September 10, 1971. No evidence was introduced of any objection having been interposed to the legislative change in question, by the Attorney General of the United States at the hearing on September 30, 1971.

On August 2, 1971, the Attorney General of the United States requested further information of the Attorney General of Arizona, which was supplied to the Attorney General of the United States August 4, 1971, and received by that office August 9, 1971.

In an undated letter written about September 9 or 10, 1971, by the Justice Department to the Attorney General of Arizona, the Justice Department stated that it consid-

ered the furnishing of the additional material as effecting an extension of the 60 day period so that it would commence on August 9, 1971. In the meantime, the Department of Justice published proposed guidelines for the administration of Section 5 of the Voting Rights Act of 1965. The parties agreed that the guidelines became effective on September 10, 1971, or subsequent to the date of the submission by the Arizona officials. Those guidelines purport to define what constitutes a "submission" for the purpose of commencing the 60 day period and to give the Attorney General of the United States the authority to extend the time if the "submission" is considered insufficient by the guidelines as interpreted by the Attorney General.

The effect of the guidelines is to make indefinite and uncertain the language and meaning of a statute which is relatively clear. It is also apparent that in this case the statutory change about which complaint is made is definite, clear, concise and simple. It requires all voters to re-register after the 1970 elections and at ten year intervals thereafter. There are no complex or devious alterations in that section.

It would appear that the Congressional intent behind § 5 of the Voting Rights Act of 1965, as amended, was to provide for the early resolution of questions related to the validity of revisions of election laws of the several states and the political subdivisions thereof. In *Allen v. State Board of Elections, supra,* the Court stated (393 U. S. 549),

> "The provision for submission to the Attorney General merely gives the covered state *a rapid method* of rendering a new state election law enforceable." (Emphasis supplied)

We do not reach the question as to the authority of the Department of Justice to extend the 60 day period by the promulgation of proposed guidelines to the administration of Section 5. They were not in force and effect as of the date of this submission. We hold that the Attorney General of Arizona complied with the provisions of § 5 by his submission on July 8, 1971; that the 60 day period provided in § 5 of the Voting Rights Act of 1965, terminated upon the expiration of 60 days from the receipt of the submission by the Attorney General of the United States, *i.e.,*

September 10, 1971; that the Attorney General of the United States has not interposed an objection within the 60 day period following submission, and therefore, the Arizona Law, Chapter 151 of the Laws of 1970, may be enforced.

The Motion to Dismiss of the defendants is granted; the Motion for Summary Judgment of plaintiffs is denied;

IT IS SO ORDERED this 4th day of October, 1971.

/s/ OZELL M. TRASK,
United States Circuit Judge.

/s/ WALTER E. CRAIG,
United States District Judge.

/s/ WM. P. COPPLE,
United States District Judge.

Footnote 1 (Reference page 1)

The statute in question which was approved by the Governor on May 18, 1970, and became effective according to its terms from and after November 4, 1970, provided in pertinent part as follows:

> "On the day immediately following the general election in 1970 and at intervals of ten years thereafter, the county recorder shall cancel all voter registrations in his county." A. R. S. § 16-150D., as amended.

Footnote 2 (Reference page 2)

§ 5 of the Voting Rights Act of 1965, as amended, 42 U. S. C. § 1973(c), so far as it is pertinent to this action, provides:

> "Whenever a State or political subdivision * * * shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision * * * shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judg-

ment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure *may be enforced* without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, * * *." (Emphasis supplied)

Footnote 3 (Reference page 2)

42 U. S. C. § 1973(c) and 42 U. S. C. § 1983; 28 U. S. C. § 1343 and 28 U. S. C. § 2201.

Footnote 4 (Reference page 4)

The other seven counties which, together with Pima County, thus become the "covered counties" under the Voting Rights Act, are, Pinal, Navajo, Cochise, Coconino, Apache, Mohave, and Santa Cruz. The first election in any of the covered counties following the filing of the determination by the Director of the Census was the primary election in the City of Tucson.

APPENDIX D

Order of May 3, 1974, *Griffith v. United States of America,* C. A. No. 74-648 (D. D. C. 1974).

[Caption omitted in printing]

ORDER

Civil Action No. 74-648

This matter is before the Court on plaintiffs' Motion for a Stay. There is, as yet, no opposition. The Court, however, having reviewed the complaint and Motion, *sua sponte,* will dismiss the action.

The plaintiffs are apparently attempting to secure a review of the Attorney General's findings that certain plans submitted pursuant to the Voting Rights Act of 1965 by the State of New York have "the purpose or effect of abridging the right to vote because of race or color". (Letter of April 1, 1974, from Stanley Pottinger, Assistant Attorney General). Under the Voting Rights Act, 42 U. S. C. § 1973c, a request for review of the Attorney General's findings may be made *only* by the "State or political subdivision" covered by the Act. The plaintiffs, as individual Assemblymen from Kings County, lack standing under the Act to bring this action.

For the foregoing reasons, it is by the Court, this 3rd day of May 1974,

ORDERED that plaintiffs' Motion for a Stay be and hereby is denied; and it is further

ORDERED that plaintiffs' complaint (which the Court also treated as a request for convocation of a three-judge court under the Act, 42 U. S. C. § 1973c, even though such request was never made) should be and hereby is dismissed.

/s/ JUNE L. GREEN,
U. S. District Court Judge.
United States District Court
for the District of Columbia

APPENDIX E

Order of November 24, 1972, *Perkins v. Kleindienst,* C. A. No. 1309-72 (D. D. C. 1972).

[Caption omitted in printing.]

ORDER

Civil Action No. 1307-72

Upon consideration of the complaint, defendants' motion to dismiss, and plaintiffs' opposition thereto, it is by the Court this 2nd day of November, 1972,

ORDERED, that defendants' motion to dismiss be, and it hereby is, denied; and

FURTHER ORDERED, that this case be, and it hereby is, remanded to the defendant Attorney General of the United States for a reasoned decision in conformity with the requirements of section 5 of the Voting Rights Act, 42 U. S. C. § 1973c and the ruling of the United States Supreme Court in *Perkins v. Mathews,* 400 U. S. 379 (1971), such decision to include findings and conclusions as to the discriminatory effect of the City of Canton's actions in 1969 (1) in the shift from electing aldermen by wards to electing them at-large, and (2) in the expansion of the city's boundaries.

/s/ JOHN H. PRATT,
United States District Judge.

APPENDIX F

Complaint of June 30, 1972, *Perkins v. Kleindienst,* C. A. No. 1309-72 (D. D. C. 1972).

[Caption omitted in printing.]

COMPLAINT

1. This is a suit for a declaratory judgment that defendants Kleindienst and Norman unlawfully failed to object to certain changes in the election procedures of the City of Canton, Mississippi, which were submitted to the defendants under the provisions of section 5 of the Voting Rights Act, 42 U. S. C. § 1973c. That statute obligates the defendants to object to a submitted voting change unless there is proof that the change does not have a racially discriminatory purpose or effect. The defendants' violation of their statutory duty in this case abridged plaintiffs' right to be free from racial discrimination or dilution in voting.

2. The particular changes under attack are (1) a shift from electing aldermen by wards to electing them at-large, and (2) an expansion of the city's boundaries which increased the white percentage of the population by bringing in additional white voters while leaving out neighboring blacks.

Jurisdiction

3. Jurisdiction arises under 5 U. S. C. §§ 701-06, 28 U. S. C. §§ 1331, 1343(4), 1361 and 2201, and 42 U. S. C. § 1973c.

Parties

4a. Plaintiffs Ernest Perkins, John Nichols, Robert Chinn, Flonzie Goodloe, and Vera Collins are black citizens of the United States and residents and qualified electors of Canton, Mississippi. Plaintiffs Perkins, Nichols and Chinn sought municipal office in 1969. Some of the plaintiffs intend to seek municipal office in Canton again.

4b. Plaintiffs obtained an injunction against enforcement of the election changes described in paragraph 2 of this complaint because of Canton's failure to submit them for clearance pursuant to 42 U. S. C. § 1973c. *Perkins v. Matthews,* 400 U. S. 379 (1971).

4c. Each plaintiff sues in his own behalf and, pursuant to Rule 23(b)(2), Fed. R. Civ. P., on behalf of all black voters and black prospective candidates, as well as all other voters and prospective candidates who are threatened with injury by Canton's election changes. The class is so numerous that joinder of all members is impracticable. The questions of law and fact are common to the class. Plaintiffs' claims are typical of the claims of the class, and plaintiffs will fairly and adequately represent the interests of the class. Defendants have acted and refused to act on grounds generally applicable to the class, thereby making final relief appropriate with respect to the class as a whole.

5. Defendant Richard Kleindienst is the Attorney General of the United States of America, and, under section 5 of the Voting Rights Act, is the official designated to receive and act on voting changes submitted under that section. Defendant David L. Norman is an Assistant Attorney General of the United States of America, in charge of the Civil Rights Division of the United States Department of Justice, to whom defendant Kleindienst has delegated general responsibility for administering section 5, including the functions of deciding whether or not to object to submitted changes, and of signing letters announcing objections and nonobjections under section 5. Each defendant is sued in his official capacity.

Operation of Section 5 of the Voting Rights Act

6. The City of Canton, like all other subdivisions of the State of Mississippi, is covered under section 5 of the Voting Rights Act. 30 Fed. Reg. 9897 (Aug. 7, 1965).

7. A state or political subdivision covered by section 5 of the Voting Rights Act, 42 U. S. C. § 1973c, may not lawfully enforce a "voting prerequisite or qualification, or standard, practice or procedure different from that in force or effect on November 1, 1964" [hereinafter referred to as a "voting change"] unless it either obtains a declaratory judgment from the United States District Court for the District of Columbia that the submitted law "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or unless the voting change "has been submitted . . . to the Attorney General and the Attorney General has not

interposed an objection within sixty days after such submission."

8. The Attorney General's regulations concerning his decision whether or not to object to a voting change read, in pertinent part, as follows:

> "Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U. S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority." 28 C. F. R. § 51.19.

Canton's Voting Changes

9. Canton is a city of 11,000 people. It has approximately 6,000 registered voters, who are approximately evenly divided between blacks and whites. The City is divided into four wards. Wards 1 and 2 are predominantly white; Wards 3 and 4 are predominantly black.

10. Officials and other white citizens of Canton have a long history of depriving black citizens of the right to

vote and of other rights guaranteed by the Constitution of the United States.

11. Until the passage of the Voting Rights Act, fewer than 200 blacks were registered to vote in Canton. No black has ever held elective office in Canton. Before 1969, no black had ever run for office in Canton. In that year, blacks ran for five of the six municipal offices.

12. Canton is governed by an elected Mayor and five elected Aldermen. The system in effect on November 1, 1964, and used in the 1965 elections provided for each of the four wards to elect one Alderman, and for the city-wide electorate to elect an Alderman-at-large and the Mayor.

13. For the 1969 elections, Canton adopted several voting changes which altered the system that had been in effect as of November 1, 1964. Two of those changes were (1) a shift from electing four of the five Aldermen by ward to electing all at-large; and (2) an expansion of the electorate in 1968 by annexing new territory containing a large number of white voters.

14. Both types of changes (shifting to at-large elections and altering city boundaries) have been commonly used to discriminate against black voters, a fact which has been recognized by the Supreme Court:

> ". . . [B]ased on the findings of an 18-month study of the operation of the Voting Rights Act by the United States Civil Rights Commission, the Commission's director reported to Congress that gerrymandering and boundary changes had become prime weapons for discriminating against Negro voters:
>
> > 'The history of white domination in the South has been one of adaptiveness, and the passage of the Voting Rights Act and the increased black registration that followed has resulted in new methods to maintain white control of the political process.
> >
> > 'For example, State legislatures and political party committees in Alabama and Mississippi have adopted laws or rules since the passage of the act which have had the purpose or effect of diluting the votes of newly enfranchised Negro voters.

> These measures have taken the form of switching to at-large elections where Negro voting strength is concentrated in particular election districts, facilitating the consolidation of predominantly Negro and predominatly white counties, and redrawing the lines of districts to divide concentrations of Negro voting strength.'"

Perkins v. Matthews, 400 U. S. 379, 389 (1971).

Submission of These Changes

15. The changes alleged in paragraph 13 were held in *Perkins v. Matthews,* 400 U. S. 379 (1971), to be voting changes which could not be enforced without section 5 clearance.

16. The City of Canton initially submitted the two changes (together with two other annexations which are not at issue here) to the Attorney General on January 7, 1972. On February 3, 1972, the Attorney General requested additional information from Canton, which was received on March 20, 1972. *See* Attachment A. Pursuant to the defendants' regulations, 28 C. F. R. § 51.18(a), the 60-day period was measured from the receipt of the additional information.

17. On May 10, 1972, plaintiffs wrote defendant Norman presenting facts and legal arguments to show why the changes were racially discriminatory, and refuting Canton's claims to the contrary. They urged that the Attorney General object to both the shift to at-large elections and the 1968 annexation. *See* Attachment B.

18. The City of Canton did not respond to, or seek to refute, the facts and arguments set forth in the aforesaid letter of May 10, 1972, although it was given the opportunity to do so.

19. The facts available to the defendants, when the decision was made, showed that the two changes at issue are discriminatory, as follows:

(a) the shift to at-large elections has had a discriminatory effect by diluting black votes;

(b) the 1968 annexation has had both a discriminatory purpose and a discriminatory effect because the boundary lines of the annexation were purposely

gerrymandered to include a large number of white people and to exclude a large number of neighboring black people; and

(c) in addition, the discrimination resulting from each change was aggravated by the combination of the two changes, because there were proportionately fewer blacks in the citywide electorate, and the citywide electorate would for the first time choose all the Aldermen.

The Defendants' Decision Not to Object

20. On May 19, 1972, Defendant Norman wrote to the City Attorney of Canton, notifying him that the Attorney General would not object to any of the voting changes submitted. *See* Attachment C.

21. The nonobjection letter was primarily or solely devoted to discussing a 1962 state statute providing for at-large municipal elections (which Canton had ignored in 1965). The 1962 statute was passed for the purpose of preventing blacks from winning elections in predominantly-black wards. The letter found that "the available facts do not persuade us that the decision to abide by state law in 1969 was racially oriented."

22. The nonobjection letter thus included or constituted a holding by the defendants that, in view of the 1962 statute, there was no showing that the purpose of Canton's change to at-large was discriminatory.

23. The letter made no findings or holdings as to the following questions:

(1) whether the change to at-large elections had a discriminatory effect;

(2) whether the 1968 annexation had a discriminatory purpose or effect; and

(3) whether the changes, in combination, had a discriminatory effect.

A finding or holding as to each of these matters is required under section 5 of the Voting Rights Act.

24. The defendants' failure to consider or decide the matters described in paragraph 23 violated their obligation under the statute, 42 U. S. C. § 1973c, the regulations, 28 C. F. R. § 51.19, and the principles established by their prior rulings.

25. The defendants' interpretation of the role of the 1962 statute, as set forth in their letter, was an error of law which violated the statute, 42 U. S. C. § 1973c.

Irreparable Injury

26. The plaintiffs and all members of their class will suffer irreparable and continuing injury if this court does not grant relief. Upcoming special elections, as well as regular elections in 1973 and thereafter, will be held at-large and with a surplus of illegally added white voters if the Attorney General's nonobjection letter is allowed to stand. Both these changes will abridge and deny plaintiffs' right to vote on account of race.

Relief

29. WHEREFORE, Plaintiffs pray that this court:

(1) advance this cause on the docket;

(2) declare that the defendants erred in not considering or deciding essential matters;

(3) declare that the defendants erred in their interpretation of the role of the 1962 statute;

(4) remand the case to the defendants for a reasoned decision and a new letter, promptly, that will accord with the law;

(5) retain jurisdiction to review the defendants' decision after remand; and

(6) award plaintiffs such other relief as this court may deem equitable.

ARMAND DERFNER,
Lawyers' Committee for Civil
Rights Under Law,
520 Woodward Building,
733 - 15th Street, N.W.,
Washington, D. C. 20005,
(202) 628-7446.

GEORGE PEACH TAYLOR,
Lawyers' Committee for Civil
Rights Under Law,
233 North Farish Street,
Jackson, Mississippi 39201,
(601) 948-5400.

June 30, 1972.

[Attachments omitted in printing.]

FOR ARGUMENT

Supreme Court, U. S.
FILED
APR 1 1977

No. 75-1583

In the Supreme Court of the United States

OCTOBER TERM, 1976

FRANCES MORRIS, ET AL., APPELLANTS

v.

L. MARION GRESSETTE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.,
Solicitor General,
DREW S. DAYS, III,
Assistant Attorney General,
LAWRENCE G. WALLACE,
Deputy Solicitor General,
HOWARD E. SHAPIRO,
Assistant to the Solicitor General,
BRIAN K. LANDSBERG,
JOHN C. HOYLE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1583

FRANCES MORRIS, ET AL., APPELLANTS

v.

L. MARION GRESSETTE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

The United States will discuss the following question:

Whether the Attorney General's objection to South Carolina's reapportionment of its Senate in Act 1205, interposed after invalidation on judicial review of the Attorney General's earlier determination not to exercise his independent judgment in deference to a prior court decision, prevents Act 1205 from becoming effective under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c.

STATUTES INVOLVED

1. Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. 1973c, and amended

by Sections 204, 206 and 405, Pub. L. 94–73, 89 Stat. 402, 404–405, 42 U.S.C. 1973c (Supp. V), is set forth at J.S. App. 57a–58a.

2. South Carolina Act 1205 is set forth in the appendix to this brief (App. A, *infra*, pp. 1A–8A).

INTEREST OF THE UNITED STATES

Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as extended and amended in 1970, 84 Stat. 315, and further extended and amended in 1975, 89 Stat. 402, 404, 42 U.S.C. (Supp. V) 1973c, requires that all changes in the voting laws or practices of covered jurisdictions be reviewed either in a declaratory judgment action in the United States District Court for the District of Columbia, or by the Attorney General. The change may not be implemented unless the court or the Attorney General determines that the change does not have the purpose or effect of discriminating on the ground of race.

The instant case directly involves the Attorney General's responsibilities under Section 5. It presents a direct conflict between the court below and the Court of Appeals for the District of Columbia Circuit[1] as to the availability of relief to compel the Attorney General to exercise independent review of changes in voting laws and practices subject to Section 5 of the Voting Rights Act.[2]

[1] *Harper* v. *Levi*, 520 F. 2d 53 (C.A.D.C.).

[2] The government has previously participated in various stages of this litigation. The Attorney General was the defendant in *Harper*, *supra*, and the United States submitted *amicus curiae* briefs supporting the plaintiffs in the court below, and urging this Court to note probable jurisdiction.

STATEMENT

Under Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. 1973c, no change in the voting laws or practices of covered jurisdictions that alters such laws or practices in effect on November 1, 1964, may be enforced unless and until the change is declared, in a suit brought by the covered jurisdiction against the United States before a three-judge district court in the District of Columbia, to be without discriminatory purpose or effect. Such a proceeding becomes unnecessary, however, if the change has been submitted to the Attorney General and "[h]e has not interposed an objection within sixty days after such submission * * *" or has sooner indicated that he does not object. *Ibid.*

The State of South Carolina is a covered jurisdiction. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 318.

A. THE REAPPORTIONMENT LITIGATION

The events leading to the Attorney General's objection to Act 1205 began more than five years ago. On November 11, 1971, South Carolina enacted alternative reapportionment plans for the State Senate (Act 932). See *Harper* v. *Levi*, 520 F. 2d 53, 57 (C.A.D.C.). Both plans provided for multi-member districts, required candidates to run for numbered posts, and required primary elections to be decided by a majority

vote. *Id.* at 57–58. Private suits contending that Act 932 violated the Voting Rights Act and the Fourteenth and Fifteenth Amendments were filed and a three-judge court was convened to hear them (*Twiggs* v. *West,* D. S.C., Civ. No. 71–1106, decided April 7, 1972). *Id.* at 58. While these actions were pending, South Carolina submitted Act 932 to the Attorney General for Section 5 clearance. *Ibid.* On March 6, 1972, the Attorney General objected to Act 932 because he was "unable to conclude * * * that the combination of multi-member districts, numbered posts, and a majority (run-off) requirement would not occasion an abridgement of minority voting rights in South Carolina." *Ibid.*

Approximately one month later, the three-judge court rejected the Fifteenth Amendment claim for lack of evidence that the reapportionment was racially motivated (J.S. App. 47a), declined to consider the Voting Rights Act challenge to Act 932 (J.S. App. 30a), but held that the Act violated the Fourteenth Amendment due to malapportionment. *Twiggs* v. *West, supra* (J.S. App. 26a–49a). The court then allowed South Carolina 30 days within which to enact an acceptable substitute reapportionment plan (J.S. App. 48a).

On May 6, 1972, the South Carolina General Assembly passed the legislation involved in this case—Act 1205 (App. A, *infra,* pp. 1A–8A). Section 2 reapportioned the State's senatorial districts. It set forth two alternative apportionments, Plan A and Plan B, and provided that if Plan A did not "meet the constitutional guidelines as set forth by the Three Judge Federal Court in its order of April 7, 1972, then the Senate * * * shall be apportioned" under Plan B (App. A, *infra,* p. 5A). This Act retained the provisions of Act 932 calling for multi-member districts, numbered posts, and a majority vote in primaries. *Harper* v. *Levi, supra,* 520 F. 2d at 57–58. Section 3 of the Act also included a provision extending the numbered post requirement to existing multi-member districts in the State's House of Representatives *Id.* at 58.

South Carolina's chief legal officer submitted Act 1205 to the Attorney General on May 12, 1972 (A. 33). Eleven days later, on May 23, 1972, the three-judge court held the Senate reapportionment constitutional (App. B, *infra,* p. 11A), and ordered Plan A into effect (*ibid.*). The court stated that it had considered a number of other plans and found no other plan to be a substantial improvement over Plan A.[3]

While the Attorney General was considering Act 1205, South Carolina, on May 30, 1972, submitted to the Attorney General additional legislation (Act 1204) which extended the numbered post requirement to "all multi-member elective districts" in South Carolina. *Harper* v. *Levi, supra,* 520 F. 2d at 58. On June 19, 1972, the Attorney General notified South Carolina that he had received the previously requested information concerning Act 1204, that the submission

[3] In an order dated June 9, 1972, denying plaintiff's motion to vacate or amend its May 23 order, the court stated that it had acted to grant relief because the General Assembly had failed to adopt a plan.

on Act 1204 was complete, and that the 60-day period for Section 5 review of that statute would begin on that date. 520 F. 2d at 59.

On June 30, 1972, the Attorney General interposed an objection to Act 1204 and to the part of Act 1205 that required numbered posts for the State's House (A. 47–50). He declined, however, to object to Section 2 of Act 1205, reapportioning the State Senate, because he felt "constrained to defer to the * * * determination of the three-judge District Court" in *Twiggs* (A. 48). The Attorney General wrote: "It would in our view not be appropriate to read the Voting Rights Act as requiring or permitting the Attorney General to review a determination made by a United States District Court in the proper exercise of its statutory jurisdiction" (*ibid.*).

B. THE SUIT TO COMPEL THE ATTORNEY GENERAL TO EXERCISE HIS DISCRETION

On August 10, 1972, two black South Carolina citizen sued the Attorney General in the District Court for the District of Columbia claiming that he had failed to exercise his discretion in not objecting to the Senate reapportionment in Act 1205, *Harper* v. *Levi, supra,* 520 F. 2d at 59. The next day, the single-judge district court entered an order stating that the time within which the Attorney General could object to Act 1205 had not expired and extending the time within which he could interpose an objection until

further order of the court, or a further decision of the Attorney General (Mot. to Aff. 19a–20a). On May 16, 1973, the single-judge district court granted summary judgment for plaintiffs and ordered the Attorney General to make "a reasoned decision in accordance with his statutory responsibility." *Harper* v. *Kleindienst,* 362 F. Supp. 742, 746 (D. D.C.), affirmed *sub nom. Harper* v. *Levi,* 520 F. 2d 53 (C.A.D.C.). In response to the order, the Attorney General filed a memorandum stating that in his opinion the Senate reapportionment had a "clear and substantial racial effect in contravention of the Fifteenth Amendment and its protections under Section 5 of the Voting Rights Act," but, nevertheless, he felt constrained to defer to the *Twiggs* decision and he declined to enter an objection. (Brief for Appellant, 4a–11a).

The district court, on July 19, 1973, issued a second order directing the Attorney General to consider Act 1205 without regard to the decision of the [*Twiggs*] Three Judge District Court." *Harper* v. *Levi, supra,* 520 F. 2d at 59. Thereafter, on July 20, 1973, the Attorney General interposed an objection *nunc pro tunc* to the Senate reapportionment because he was "unable to conclude that Act No. 1205 does not have the effect of abridging voting rights on account of race" (A. 51–52).

On appeal from the single-judge court's orders in *Harper,* a divided panel of the District of Columbia

Circuit affirmed,[4] holding (520 F. 2d at 59–60); footnotes omitted)—

> that the court had jurisdiction [under 5 U.S.C. 702] of appellees' action, that the Attorney General's decision not to object was reviewable under the circumstances of this case, and that Section 5 requires him to make an independent determination on the merits of the Section 5 issues.

C. THE THREE-JUDGE COURT DECISION IN THIS CASE

After that decision became final, two other South Carolina voters filed the present suit, as a class action under Section 5, in the district court in South Carolina (A. 2–7).[5] Plaintiffs sought to enjoin implementation of the Senate reapportionment plan contained in Act 1205 on the ground that it had not been cleared under Section 5 by the Attorney General, or by a declaratory judgment action in the District Court for the District of Columbia (*ibid.*). A three-judge court convened under Section 5[6] unanimously

[4] Judge MacKinnon, dissenting, reasoned that Section 5's provision permitting a submitted change to be enforced within sixty days if the Attorney General failed to object committed the matter of objection solely to agency discretion. It was therefore unreviewable. 520 F. 2d at 73–74.

[5] The defendants, appellees in this Court, were the President Pro Tem, and the Clerk of the South Carolina Senate; the Governor and Lieutenant Governor; the members and Executive Director of the South Carolina State Election Commission; the Attorney General; and the Secretary of State of South Carolina.

[6] Two of the judges (Haynsworth, C. J., and Russell, J.) had participated in *Twiggs* v. *West*, *supra*.

dismissed the complaint (J.S. App. 1a–25a). It held that the doctrine of collateral estoppel did not preclude the court from considering South Carolina's contention that, notwithstanding *Harper* v. *Levi*, *supra*, the requirements of Section 5 were satisfied when the Attorney General failed to interpose an objection within sixty days after submission to him of the Senate reapportionment plan contained in Act 1205 (J.S. App. 5a). Second, it ruled that the original determination by the Attorney General under Section 5 to defer to the district court in *Twiggs* v. *West* and to decline to render an independent judgment was not judicially reviewable (J.S. App. 25a). Finally, it held that the failure of the Attorney General to interpose an objection within sixty days of the submission authorized the State of South Carolina to implement the Senate reapportionment plan contained in Act 1205 (J.S. App. 25a). Accordingly, the court denied the injunction and dismissed the complaint.

SUMMARY OF ARGUMENT

Since South Carolina Act 1205 has not been declared by the District Court for the District of Columbia to be without racially discriminatory purpose or effect, it cannot be implemented under Section 5 of the Voting Rights Act if the objection interposed by the Attorney General on July 20, 1973, *nunc pro tunc*, is valid. That in turn depends upon the power of the reviewing court in *Harper* v. *Kleindienst*, *supra*, to compel the Attorney General to exercise

his independent judgment, and to set aside his prior non-objection to Act 1205 on the ground that he had failed to perform his duty under Section 5 by deferring to a district court's approval of Act 1205 under the Fifteenth Amendment. It is now clear that district courts evaluating legislation subject to Section 5 may not pass upon Fifteenth Amendment issues until the procedures of Section 5 have been satisfied. *Connor* v. *Waller,* 421 U.S. 656. Accordingly, the Attorney General has abandoned his prior policy of deferring to such decisions.

His erroneous deferral in this case resulted, as the *Harper* court correctly held, in substantial injury to the statutory rights under Section 5 of voters in South Carolina. Those rights include being freed from compliance with changed election laws or procedures until they are cleared under Section 5; interposition of the District of Columbia court or the Attorney General between the voter and the covered jurisdiction; transfer from the citizen to the covered jurisdiction of the burden of initiating proceedings; assignment of venue to the District of Columbia; and shift of the burden of proof on the issue of discriminatory purpose or effect from the injured voter to the covered jurisdiction.

As noted in *United Jewish Organizations* v. *Carey,* No. 75–104, decided March 1, 1977 (slip op. 8) (Brennan, J., concurring): "Under § 5 of the Act, the Attorney General in effect is constituted champion of the interests of minority voters * * *."

But Congress' purpose is assigning this role to the Attorney General would be defeated if, pursuant to an erroneous deferral policy, he did not make an independent determination under Section 5, for the whole scheme of the Act rests upon the assumption that he will do so. This is confirmed by the Attorney General's regulations adopted in 1971, requiring him to make the same kind of independent determination that must be made by the District Court for the District of Columbia, and by Congress' reenactment of the statute in 1975 with full knowledge of those regulations. *Georgia* v. *United States,* 411 U.S. 526, 533.

The immediate effect of the Attorney General's failure to decide is the lifting of Section 5's automatic suspension, thus subjecting all citizens of a covered jurisdiction to the new voting requirements regardless of their discriminatory purpose or effect. Thereafter, their only remedy is a suit under the Fifteenth Amendment, the very remedy Congress found to be so inadequate that it enacted the special statutory protections of Section 5 to secure voting rights in covered jurisdictions. Thus the consequences of the Attorney General's failure to decide would fall not on him, but on the minority voters the Act is intended to protect.

The provision of Section 5 permitting voting changes submitted to the Attorney General to be implemented if "the Attorney General has not interposed an objection within sixty days of the submission" does not bar a suit by injured voters filed more

than sixty days after submission to compel him to make a determination. The legislative history shows that Congress intended preclearance by the Attorney General to be a convenience for covered jurisdictions. *Georgia* v. *United States,* 411 U.S. 526, 538. The Attorney General, however, was not simply to be given an opportunity to act; he was required to exercise his independent discretion in order to effectuate the Act's purposes. Congress could assume that this duty would be enforceable under the presumption of reviewability available to compel the performance of a duty to the plaintiff (28 U.S.C. 1361), including agency action unlawfully withheld (5 U.S.C. 706(1)). *Dunlop* v. *Bachowski,* 421 U.S. 560, 567; *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140. "Any less stringent standard might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance." *Georgia* v. *United States, supra,* 411 U.S. at 538.

The Act's sixty-day provision, therefore, should be construed, in light of the Act's history, to assure reasonable effectuation of Section 5's purposes. Cf. *Georgia* v. *United States, supra.* An action to compel the Attorney General to exercise his independent discretion fits those purposes, for without such review minority voters injured by his failure to decide would have no remedy whatever under Section 5. On the other hand, the remedy itself is a restricted, familiar and traditional form of mandamus. *Virginian Railway Co.* v. *System Federation No. 40,* 300U.S. 515, 551;

Thermtron Products, Inc. v. *Hermansdorfer,* 423 U.S. 336. Indeed, the remedy in *Harper* is directly analogous to that in *Dunlop* v. *Bachowski, supra,* involving limited, but somewhat broader judicial review to protect the rights of a union electorate.

Accordingly, Act 1205 should not have been implemented, and the district court should be directed to grant appellants' request for special elections, under a lawfully adopted plan, to be held in November 1978 to coincide with the general election to be conducted at that time.

ARGUMENT

THE ATTORNEY GENERAL'S OBJECTION INTERPOSED UNDER SECTION 5 OF THE VOTING RIGHTS ACT PREVENTS THE SOUTH CAROLINA SENATE REAPPORTIONMENT ACT FROM BECOMING EFFECTIVE AS LAW

It is conceded (Br. for Appellees, p. 9) that Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. 1973c, applies to the South Carolina Senate Reapportionment Act (Act 1205),[7] and that Act 1205 has not been declared, in an action brought by the State in the District Court for the District of Columbia, to be without the purpose or effect of denying the right to vote on account of race or color.[8] Accordingly, the objection to Act 1205 inter-

[7] See *Georgia* v. *United States,* 411 U.S. 526.

[8] Although the parties proceeded in the court below on the theory that Section 5 applies to Act 1205, appellants, in a post-judgment motion, filed after this Court's decision in *East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636, argued that under the rule of that case Act 1205 might be a court-ordered plan out-

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posed by the Attorney General prevents that Act from becoming effective as law unless that objection

side the scope of Section 5. Appellants no longer urge this point; all parties agree that Act 1205 is a legislative plan subject to Section 5's preclearance requirements. We discuss this question briefly, however, because there would have been no reason to reach the question of the validity of the Attorney General's objection in this case if Section 5's preclearance requirements were not applicable, and because the distinction between a legislative plan and a court-ordered plan is important in the administration of Section 5.

We believe that the reapportionment plan embodied in Act 1205 is not a court-ordered plan within the meaning of *East Carroll*. Contrary to the situation in *East Carroll*, the South Carolina legislature "reapportioned itself on its own authority." *East Carroll*, *supra*, 424 U.S. at 638–639 n. 6. The district court did not direct the preparation of a plan to be submitted for proposed adoption by it, but, rather, allowed the legislature 30 days to enact one.

We recognize, however, that the distinction between court-ordered plans under *East Carroll* and non-court ordered plans subject to Section 5 is not always clear. Act 1205, for instance, has some attributes of a court-ordered plan. While Plan A is stated in enacting language ("the state of South Carolina is hereby divided into the following Senatorial Districts" (App. A, *infra*, p. 4A)), the Act includes as an alternative Plan B which is to take effect "[i]n the event that Plan A does not meet the constitutional guidelines as set forth by the Three Judge Federal Court * * *" (App. A, *infra* p. 5a). It also recites the consensus of the Legislature that the two plans should be submitted to the district court in the hope that the court would adopt one (App. A, *infro*, p. 3A). The district court, indicating that it had found no other plan to be a substantial improvement over plan A contained in Act 1205, approved that plan (App. B, *infra*, 11A). In our view, however, the controlling fact is that the legislature acted on its own authority. The subsequent approval of the legislature's enactment does not change its nature or origin. Accordingly, the plan "[could] not be effective as [law] until and unless cleared pursuant to § 5." *Connor* v. *Waller*, 421 U.S. 656. See also *United States* v. *Board of Supervisors*. No. 76–489, decided February 22, 1977. Should this Court, however, determine that Act 1205 is a

is invalid.[9] The validity of that objection turns on the availability of judicial relief to compel the Attorney General to exercise independent review of changes in voting laws and practices subject to Section 5.

The court below concluded that the district court in the *Harper* litigation was without jurisdiction to order such relief, and hence held the Attorney General's otherwise untimely objection to be a nullity. We submit that the district court misapprehended the language and purpose of Section 5, and disregarded the fact that *Harper* involved only a traditional remedy to compel the exercise of administrative discretion.

The Attorney General's letter of June 30, 1972 (A. 47) did not represent his independent determination as to whether the Senate Plan in Act 1205 had the purpose or effect of abridging the right to vote on account of race. Rather, as the letter expressly indicates (A. 48), the Attorney General declined to make that determination in deference to the decision of the three-judge court in *Twiggs* (App. B, *infra*, pp. 9A–11A), which held that Act 1205 met the requirements of the Fifteenth Amendment.

court-ordered plan, the presumption against the use of multi-member districts would, of course, apply. *East Carroll*, *supra* 424 U.S. at 639.

[9] If the objection is valid, appellees may seek a declaratory judgment from the district court for the District of Columbia that the Act "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. * * *" 42 U.S.C. 1973c. See *Beer* v. *United States*, 425 U.S. 130; *City of Petersburg* v. *United States*, 410 U.S. 692, affirming 354 F. Supp. 1021 (D. D.C.). They have not done so.

This policy of deference, however, was incorrect. It was based upon the then prevalent belief that a local district court seised of a reapportionment suit involving voting law changes adopted after November 1, 1964, "unquestionably had jurisdiction to consider the issues presented to it under both the Fourteenth and Fifteenth Amendments" (A. 48). See *Georgia* v. *United States, supra,* 411 U.S. at 527. In 1975, however, this Court held in such a suit (*Connor* v. *Waller,* 421 U.S. 656) that new reapportionment legislation adopted in the course of litigation is not effective in a covered jurisdiction until clearance under Section 5 has been obtained from the District Court for the District of Columbia or the Attorney General. Therefore a local district court erred in considering the constitutionality of such legislation under the Fifteenth Amendment. See also *United States* v. *Board of Supervisors,* No. 76–489, decided February 22, 1977. Thus under the rationale of *Waller,* the district court in *Twiggs* should not have considered the Fifteenth Amendment issue at all, nor should the Attorney General have deferred to its decision.[10]

The question remains whether the *Harper* court had jurisdiction, on judicial review, to nullify this erroneous determination, so that the Attorney General could reconsider South Carolina's submission of Act 1205 *nunc pro tunc.* The court below denied such

[10] The government's appeal from the district court's decision in *Harper* (*Harper* v. *Levi,* 520 F. 2d 513 (C.A.D.C.)) antedated this Court's decision in *Connor* v. *Waller, supra.*

jurisdiction on several grounds. First, it held the Attorney General's action of June 30, 1972 was not "adjudicatory", i.e., it had no binding effect on anyone's legal rights (J.S. App. 14a–15a). Moreover, it reasoned, any party dissatisfied with the Attorney General's failure to object had an adequate remedy in court, because Section 5 expressly provides that "neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement [of the change in election procedures]" (J.S. App. 15a). Thus, in the court's view, no private voter can be "adversely affected" or suffer any injury in fact entitling him to seek judicial review under the Administrative Procedure Act, 5 U.S.C. 702. The court further concluded that the express language of Section 5, as well as its legislative history, demonstrated that determinations by the Attorney General under Section 5 are not reviewable. To allow such review, it said, would, through delay, defeat the purpose of that sixty day limit within which the Attorney General can object before a submitted change in voting procedures may become effective and would require the Attorney General to make explicit reviewable findings, in the absence of a statutory requirement that he do so (J.S. App. 20a–23a). The court also stated that such review would be inappropriate because it would be available to private parties, in the form of a suit before a single judge district court under 5 U.S.C. 702, but would not be equally available to the states covered by Section 5, since the

states' sole remedy is by a declaratory judgment action in a three-judge district court in the District of Columbia (J.S. App. 24a–25a).

The district court's conclusion that no rights are determined when the Attorney General defers to a court ruling instead of exercising independent discretion is incorrect. Section 5 created a new statutory interest, supplementary to, but separate from the rights enforceable in a Fifteenth Amendment suit. It was Congress' answer to "nearly a century of systematic resistance to the Fifteenth Amendment * * *." *South Carolina* v. *Katzenbach,* 383 U.S. 301, 328. The statute was designed to counter a specific form of resistance that had become familiar in the immediately preceding years: rapid enactment of new laws to undo or undercut the results of successful Fifteenth Amendment litigation. *Allen* v. *State Board of Elections,* 393 U.S. 544, 548. See also *United Jewish Organizations* v. *Carey,* No. 75–104, decided March 1, 1977, slip op. 10–11 (opinion of Mr. Justice White). Congress therein directed the automatic suspension of all new election requirements in covered jurisdictions, including reapportionment (*Georgia* v. *United States, supra; Allen* v. *State Board of Elections; supra; Beer* v. *United States,* 425 U.S. 1302; *United Jewish Organizations* v. *Carey, supra*), subject to alternative procedures for administrative or judicial determination that "continued suspension of the new rule is unnecessary to vindicate rights guaranteed by the Fifteenth Amendment." *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 335. Section 5

shifted to the covered jurisdictions of making the burden the initial showing, either to the Attorney General or to the District Court for the District of Columbia, that new voting enactments did not have a discriminatory purpose or effect. *Georgia* v. *United States, supra,* 411 U.S. at 538. It was hoped that this procedure would make constitutional litigation unnecessary in the great majority of instances. *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 327–328.

The suspension and preclearance procedure of Section 5 has five legally significant effects upon the rights of voters in covered jurisdictions. First, it frees them from the requirement of complying with changed election laws or procedures until the changes are shown to have no racially discriminatory purpose or effect. Second, it interposes the federal government between the voter protected by the Fifteenth Amendment and the covered jurisdiction. Third, it imposes on the jurisdiction, not the citizen, the burden of initiating clearance proceedings. Fourth, it transfers the venue of such proceedings to the District of Columbia. Fifth, it places the burden of proving the absence of discriminatory purpose or effect upon the covered jurisdiction.

Congress adopted this "unusual and * * * severe procedure" (*Allen* v. *State Board of Elections,* 393 U.S. 544, 556) because it found that "existing remedies were inadequate" (*ibid.*) to assure vindication of Fifteenth Amendment rights in the face of persistent efforts in some States to defeat them. See *South Carolina* v. *Katzenbach, supra,* 383 U.S. at

309. By these new statutory procedures, Congress intended "to make the guarantees of the Fifteenth Amendment finally a reality for all citizens" (*Allen, supra,* 393 U.S. at 556).

The Attorney General's role in passing upon Section 5 submissions is essential to the achievement of this purpose. As recently observed in a case involving a state's response to the Attorney General's action under Section 5 (*United Jewish Organizations* v. *Carey,* No. 75–104, decided March 1, 1977, slip op. 7–8) (Mr. Justice Brennan, concurring):

> The participation of the Attorney General, for example, largely relieves the judiciary of the need to grapple with the difficulties of distinguishing benign from malign discrimination. Under § 5 of the Act, the Attorney General in effect is constituted champion of the interests of minority voters, and accompanying implementing regulations ensure the availability of materials and submissions necessary to discern the true effect of a proposed reapportionment plan. See 28 C.F.R. § 51.19. This initial right of review, coupled with the fact-finding competence of the Justice Department, substantially reduces the likelihood that a complicated reapportionment plan that silently furthers malign racial policies would escape detection by appropriate officials.

The whole scheme of the Act thus rests upon the premise that the Attorney General will make an independent determination to assure protection of minority voting rights.[11] Congress expected the Attorney General to give his careful and good-faith

consideration to § 5 submissions and, within 60 days after receiving all information he deemed necessary, to make up his mind as to whether the proposed change did or did not have a discriminatory purpose or effect, and if it did, to object thereto" (White, J., dissenting on other grounds in *Georgia* v. *United States, supra,* 411 U.S. at 543). The Act has twice been extended on this understanding. 84 Stat. 315; 89 Stat. 402, 404.[11]

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[11] The legislative understanding that the Attorney General would in each case make an independent determination was summarized in connection with the 1975 extension and amendment of the Voting Rights Act, 89 Stat. 404, 42 U.S.C. (Supp. V) 1973c. The House Judiciary Committee expressly noted that (H.R. Rep. No. 94–196, 94th Cong., 1st Sess., pp. 8–9 (1975) (emphasis added)):

"Section 5 of the Act *requires* review of all voting changes prior to implementation by the covered jurisdictions. The review may be conducted by either the U.S. District Court for the District of Columbia or by the Attorney General of the United States.

* * * * *

"It was not until after the 1970 Amendments that Section 5 actually came into extensive use. At the time of the adoption of those amendments, Congress resisted attempts to repeal the preclearance provisions, and in so doing gave a clear mandate to the Department of Justice that it improve enforcement of Section 5 * * *. * * * On September 10, 1971, the Department of Justice for the first time adopted regulations for implementing Section 5's preclearance provisions" (36 Fed. Reg. 18186).

The regulations described in the House Report, *supra*, expressly require the Attorney General to make an independent determination, just as would the District Court for the District of Columbia. 28 C.F.R. 51.19. See note 15, *infra*, pp. 27–28.

If in reconsidering the Act in 1975 Congress had disagreed with the Attorney General's interpretation of Section 5, "it had ample

A determination by the Attorney General to defer to a district court without making an independent determination with respect to legislation which has not been declared by the District Court for the District of Columbia to meet Section 5's substantive requirements has a substantial, adverse effect on the rights of voters protected by that Section. The immediate consequence of the Attorney General's failure to decide is the lifting of the automatic suspension and elimination of the need for clearance in a proceeding by the covered jurisdiction before the District of Columbia court. Thereafter, all citizens of the covered jurisdiction must adhere to the new voting requirements. If those requirements perpetuate racial discrimination, the sole remedy for vindication of Fifteenth Amendment rights is a private suit in which the citizen must carry the burden of proving racially discriminatory purpose or effect. This is, however, the very remedy that Congress found to be inadequate, and that it sought to supplement by the

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opportunity to amend the statute." *Georgia* v. *United States*, *supra*, 411 U.S. at 533. "Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute." *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U.S. 269, 273.

Aspects of the Attorney General's regulations imposing the burden of proof on covered jurisdictions and delaying the running of the 60-day period under Section 5 until the Attorney General had received sufficient information were sustained in *Georgia* v. *United States*, *supra*, 411 U.S. at 531–540. The Court there noted that "[t]he judgment that the Attorney General *must* make is a difficult and complex one, and no one would argue that it should be made without adequate information." *Id.* at 540 (emphasis added).

suspension and preclearance provisions of Section 5 (see pp. 19–20, *supra*). That Section's five effects (p. 19, *supra*) provide the requisite support for private actions to enjoin the implementation of voting changes by covered jurisdictions in the absence of the required clearance under Section 5. *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 556–557. Since these privately enforceable statutory rights may be lost forever when the Attorney General fails to object, it is incorrect to reason, as did the district court, that no legal rights are determined when the Attorney General announces his determination to defer, rather than to exercise his judgment on the merits.[12]

On the contrary, such a deferral entails substantial legal consequences, since it removes the barrier to enforcement of the state law imposed by Section 5. It has the practical effect of eliminating the protections of Section 5 and of authorizing a change in the state's voting laws.

These consequences, however, do not in themselves establish that a judicial remedy is available to review a policy of the Attorney General that results in failure to exercise his independent discretion under Sec-

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[12] For these reasons, the district court's reliance on *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, is misplaced. The Court there held unreviewable an agency's determination of probable cause to refer a drug company's case to the Attorney General for the institution of seizure proceedings because its only consequence was to subject the company to possible suit. As we have shown above, the determination here has immediate effects on the voting rights of citizens.

tion 5. For it is not unreasonable to read the language of the proviso to Section 5 that makes preclearance by the Attorney General an alternative to a declaratory judgment suit in the District of Columbia, as permitting a voting change to become effective if the Attorney General has failed to act within 60 days for any reason, or for no reason at all.[13] See *Harper* v. *Levi, supra,* 520 F. 2d at 73–74 (MacKinnon, J., dissenting); *State Board of Election Commissioners* v. *Evers,* 405 U.S. 1001 (Blackmun, J., concurring). But such a reading of the statute would set at naught the protections Congress intended for minority voters because of an administrative official's failure to exercise his independent responsibili-

[13] The proviso presently reads as follows (42 U.S.C. (Supp. V) 1973c):

"*Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section."

ties. The consequences of such a failure would fall not on the official, but on the minority voters. In view of the important rights involved, such a construction would be at odds with the intent of Congress and should be rejected. Cf. *Connell Co.* v. *Plumbers & Steamfitters,* 421 U.S. 616, 628–633.

Although the language and history of Section 5 demonstrate that the Attorney General's determination is to be made swiftly (*Georgia* v. *United States, supra,* 411 U.S. at 539) and independently (*Perkins* v. *Matthews,* 400 U.S. 379, 385), they do not support the district court's conclusion that Congress foreclosed the kind of limited judicial relief exercised in *Harper.* The provision for clearance by the Attorney General within a fixed period was suggested by then Attorney General Katzenbach in response to concerns that plainly lawful state legislation would be unduly delayed pending a declaratory judgment action in the District Court for the District of Columbia. The Attorney General suggested that the declaratory judgment action could be limited "to those laws which the Attorney General takes exception to within a given period of time." Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., Pt. 1, 237 (1965). He did not suggest that judicial review was to be totally foreclosed, nor did anyone else.[14]

The sixty-day limit contained in Section 5 is not evidence that Congress intended to foreclose limited

[14] The history is summarized in *Harper* v. *Levi, supra,* 520 F. 2d at 65. Section 8 of the original bill (S. 1564, 89th Cong., 1st Sess.

judicial review. It serves to assure expeditious clearance by the Attorney General of changes in state law which comply with the substantive standards of Section 5 as part of "[t]he alternative procedure of submission to the Attorney General [that] 'merely gives the covered State a rapid method of rendering a new State election law enforceable.' *Allen* v. *State*

(1965)) provided only for preclearance by the District Court for the District of Columbia. Attorney General Katzenbach's suggestion was made at Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess, Pt. 1, 237 (1965). Although Mr. Katzenbach's suggestion was taken up and incorporated into the bill, neither the Committee reports nor the debates discuss the proposal. S. Rep. No. 162, 89th Cong., 1st Sess. (1965); H.R. Conf. Rep. No. 711, 89th Cong, 1st Sess, (1965). Thus, as noted in *Harper* (520 F. 2d at 65 n. 95), "[t]he only explanation is the testimony of Attorney General Katzenbach."

In 1975, the statute was amended to provide that "[i]n the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty day period which would otherwise require objection" (Pub. L. 94–73, Section 405, 89 Stat. 404). Contrary to appellees' contention (Br. 38 n. 69), this amendment did not reflect an understanding that failure of the Attorney General to make an independent determination, when expressed in an affirmative indication that he will not object, validates changes in a state's voting laws. The purpose of these amendments was to "codify the already existing expedited consideration procedures which the Department of Justice has established in its Section 5 regulations." 28 C.F.R. 51.22; H.R. Rep. No. 94–196, 94th Cong., 1st Sess., p. 35 (1975). The regulations, and the amendment, were designed to provide for the situation in which the Attorney General had made an independent determination within the 60-day period only to learn that he had done so on the basis of an inadequate submission. The amendment thus confirms that Congress intended the Attorney General to make an informed, independent ruling.

Board of Elections, 393 U.S., at 549." *Georgia* v. *United States, supra,* 411 U.S. at 538. By establishing this convenience for covered jurisdictions, Congress did not intend merely to provide the Attorney General with an opportunity to act; it required him to make an independent substantive determination.

Congress could safely assume that the Attorney General's adoption of a policy contrary to this obligation to exercise independent judgment would be subject to the presumption of reviewability contained in the Administrative Procedure Act (5 U.S.C. 701–706) (see *Dunlop* v. *Bachowski,* 421 U.S. 560, 567; *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140)—and, specifically, to that Act's provisions (now 5 U.S.C. 706(1)) for a limited judicial remedy to compel the exercise of administrative discretion. "Any less stringent standard might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance." *Georgia* v. *United States, supra,* 411 U.S. at 538. Thus the sixty-day limit is not conclusive of the rights of the citizens protected by Section 5, where the Attorney General has failed to exercise his independent discretion within that period.[15]

Rather, in light of the statute's history and purpose, and in light of the policies underlying the gen-

[15] In a deposition taken in this case, Mr. Gerald W. Jones, Chief of the Voting Rights Section of the Civil Rights Division of the Department of Justice, was asked whether a description of Section 5 procedures which included the statement that "[i]f the 60 days pass and the Attorney General has taken no action or has

eral grants of limited reviewing authority in the courts,[16] we submit that the extent to which judicial review of the Attorney General's action or inaction under Section 5 is proper depends on whether such review is a reasonable effectuation of the purposes of

not objected, the change can be put into effect" (A. 39) was an accurate statement of the policy and practice of the Voting Rights Section (A. 40). Mr. Jones testified that the description was "a correct statement of the general practice of the voting section in administering section 5 and is, as outlined in the Administrative Procedures for the administration of section 5" (A. 41). Mr. Jones' testimony merely confirms, *inter alia*, that if the Attorney General, in exercising his function under the statute, does not interpose an objection within the 60-day period the change may be put into effect. It does not mean that the Attorney General can fail to consider a proper submission under Section 5. The section would be meaningless if it did not contemplate that the Attorney General would consider the submission and decide whether or not to interpose an objection.

Moreover, the regulations referred to, entitled "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965" (28 C.F.R. Part 51), also contemplate that the Attorney General will give full consideration to every submission and will exercise his judgment whether or not to interpose an objection. These regulations specify, *inter alia*, the standards to be applied by the Attorney General in considering submissions from covered jurisdictions (§ 51.19); the procedures for notifying jurisdictions of receipt of a submission (§ 51.16), the return of inappropriate submissions (§ 51.17), the obtaining of further information regarding a submission (§ 51.18), notifying the jurisdiction of the Attorney General's decision to object (§ 51.21) or not to object (§ 51.20), giving a particular submission expedited consideration (§ 51.22), reconsideration of a submission (§§ 51.23, 51.24), and withdrawal of an objection (§ 51.25); and the records concerning submissions to be kept by the Attorney General (§ 51.26).

[16] See 28 U.S.C. 1361 (district courts have jurisdiction of suit to compel performance of official duty); 5 U.S.C. 706(1) (reviewing court may compel agency action unlawfully withheld). Venue for such actions would appear to be confined to the District of Columbia. 42 U.S.C. 1973*l*(b).

the Act.[17] In considering that question, it should be kept in mind that if a state finds the Attorney Generals' delays unreasonable, or if he objects to the submission, "the State may still enforce the legislation upon securing a declaratory judgment in the District Court for the District of Columbia." *Allen* v. *State Board of Elections, supra,* 393 U.S. at 549. But unless there is limited judicial review to assure that the Attorney General does not pursue an erroneous policy of refusing to exercise his independent discretion, the minority voters whose interest the Attorney General is to safeguard will have no remedy whatever under Section 5.

We submit, therefore, that as a proper counterbalance to the right of states to obtain a *de novo* determination under Section 5 from the District Court in the District of Columbia, notwithstanding the Attorney General's refusal to clear proposed voting changes, protected minority voters have a right to judicial review for the limited purpose of compelling

[17] A similar approach was adopted by the Court in sustaining the Attorney General's Section 5 regulations that placed the burden of proving compliance with the statute's standards on covered jurisdictions. *Georgia* v. *United States, supra.* See note 11, pp. 21–22, *supra.* Similarly, the Attorney General's regulation delaying the running of the 60-day period until a complete submission is tendered, was sustained in *Georgia* v. *United States* as consistent with Section 5 because the only other "plausible response to an inadequate or incomplete submission would be simply to object to it." 411 U.S. at 540. Such an objection would be in effect a determination that the state had failed to carry its burden of proving the absence of discriminatory purpose or effect, and thus would represent a valid exercise of the Attorney General's independent discretion under Section 5.

the Attorney General to exercise his independent discretion when, pursuant to an erroneous policy, he has failed to do so.

Such an action is a restricted, familiar and traditional judicial remedy. Indeed, as the *Harper* court noted, the proceeding in that case was instituted and prosecuted in the District Court for the District of Columbia under its "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. 1361; *Harper* v. *Levi, supra,* 520 F. 2d at 64 n. 87. Such jurisdiction is consistent with the power of reviewing courts, under the Administrative Procedure Act, to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1).

The scope of that remedy, however, is extremely narrow. The minority citizens seeking review in *Harper* contended "simply, and the District Court held only, that the Attorney General improperly relinquished his responsibility to independently evaluate the submitted legislation in light of the standards established by Section 5." *Harper* v. *Levi, supra,* 520 F. 2d at 67. Thus the court in *Harper* expressed "no opinion on reviewability of a determination not to object allegedly involving an erroneous application of § 5's purpose-effect standard." *Id.* at 67 n. 115.[18]

[18] Indeed, it noted "that orthodox judicial review of a decision to interpose an objection presents different questions. It may be that Congress intended to confine review of such a decision to the declaratory judgment action specified in § 5." 520 F. 2d at 67 n. 115. This seems indicated by *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 562; and *United Jewish Org. of Williamsburgh* v. *Wilson*, 510 F. 2d 512, 520 (C.A. 2), affirmed *sub nom. United Jewish Organizations* v. *Carey*, No. 75-104, decided March 1, 1977.

"It is a familiar rule that a court may exercise its equity powers, or equivalent mandamus powers, * * * to compel courts, boards, or officers to act in a matter with respect to which they may have jurisdiction or authority, although the court will not assume to control or guide the exercise of their authority." *Virginian Railway Co.* v. *System Federation No. 40,* 300 U.S. 515, 551 (dictum) (citation omitted). See, also, *Panama Canal Co.* v. *Grace Line, Inc.,* 356 U.S. 309, 317–318. As the court of appeals stated in *Harper* (520 F. 2d at 63):

> The crucial consideration is that, though decision-making is dictated, the decision itself is not—the Attorney General, though compelled to decide, is left completely unfettered as to how to decide.

The order entered by the *Harper* court resulted from the Attorney General's "deferral"—which was not authorized by law. It is analogous to the relief afforded in *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U.S. 336. In that case, a federal district court to which a diversity action had been removed remanded the case to state court in the interest of expedition, on the ground that its docket was overcrowded. Under 28 U.S.C. 1447(c), a district court may remand the case if it was "removed improvidently and without jurisdiction." Review of such a remand order is expressly pro-

hibited by 28 U.S.C. 1447(d). The defendants who had sought the removal, however, applied for a writ of mandamus to the Court of Appeals for the Sixth Circuit. That court denied the writ, but this Court reversed. Similarly to the case of Section 5 submissions, which the Attorney General may "clear" by making an independent decision not to object within 60 days, the district court in *Thermtron* could have remanded the case as "improvidently removed" and no review would have been available. 423 U.S. at 343. But where the district court explicitly based its remand order on a ground not authorized by law, this Court held, the court of appeals had both the power and the duty to "review" the order by writ of mandamus and compel the district court to take jurisdiction of the case.

Here the Attorney General's decision to defer to the *Twiggs* court has been shown by subsequent decisions of this Court to have been erroneous (see p. 16, *supra*). As we now understand the law in light of *Connor* v. *Waller, supra,* the Attorney General should have exercised his independent authority to review Act 1205. Accordingly, the *Harper* court's order did no more than require the Attorney General to perform the responsibilities placed on him by the Voting Rights Act.[19] It did not interfere with the exercise of

[19] See also *Briscoe* v. *Levi*, 535 F. 2d 1259 (C.A.D.C.), certiorari granted, December 6, 1976, No. 76–60, where the court of appeals in considering the 1975 amendments to the Voting Rights Act stated (535 F. 2d at 1265): "It is * * * apparent that even where the intent of Congress was to preclude judicial review, a limited jurisdiction exists in the court to review actions which on their face are plainly in excess of statutory authority."

his independent authority to decide whether the submitted act had the purpose or effect of denying or abridging the right to vote on account of race.

In holding that such limited judicial relief is a nullity to be disregarded, the decision below is inconsistent with *Dunlop* v. *Bachowski,* 421 U.S. 560. This Court there held that the Administrative Procedure Act authorizes judicial review, for limited purposes, of a decision of the Secretary of Labor not to bring a civil action to set aside a union election under Section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 73 Stat. 534, 29 U.S.C. 482(b). The court below purported to distinguish *Bachowski* on the ground that suit by the Secretary was the exclusive remedy for irregularities in a union election, and plaintiffs there thus had no adequate remedy at law. The same is true, we submit, with respect to Section 5, since a determination by the Attorney General to defer to the district court ruling and not to decide independently whether to object under Section 5 leaves a state's voters without the protections of that statute. His non-objection based on such a determination affects the statutory rights of the state's electorate under the Voting Rights Act at least as much as the Secretary's decision not to challenge a union election affects the rights of the union electorate under the LMRDA.[20]

[20] Appellants, on the other hand, contend (Br. 14–20) that this Court need not determine whether the decision in *Harper* is correct because the single-judge district court in that case issued an interlocutory order declaring that the Attorney General's time to object

Indeed, the holding below that a voter suit under the Fifteenth Amendment is an adequate remedy at law not only is contrary to the congressional finding that such relief is inadequate, it also misconstrues the language of 5 U.S.C. 704, which defines the kinds of administrative actions subject to judicial review. That section expressly provides for judicial review of "final *agency* action for which there is no other adequate remedy in a court * * *" (emphasis added). A private suit challenging a state voting law under the Fifteenth Amendment does not involve review of "agency" (the Attorney General's) action under Section 5. Thus the right to an independent exercise of discretion by the Attorney General before the pro-

had not expired, and would be extended until he acted or until further order of the court. The Attorney General subsequently interposed his objection. See Statement, *supra*, pp. 6–7. Under *United States* v. *United Mine Workers*, 330 U.S. 258, the argument continues, the court's order was intended to preserve the status quo pending the court's determination of its jurisdiction, and therefore was within the inherent powers of the district court. Appellants thus argue that because the Attorney General's objection was interposed pursuant to that order, it prohibits the effectuation of Act 1205. This aspect of *Mine Workers*, however, involved the power of the district court to impose contempt sanctions upon a party for disobeying an order directed to it. In this case South Carolina was not a party to the *Harper* litigation and was not under a court order restraining enforcement of Act 1205. *Mine Workers* therefore has no application here. The Attorney General's objection was interposed only because the *Harper* court ordered him to exercise his independent authority and not to defer to the ruling of the *Triggs* court. The validity of that interlocutory order depends upon the reviewability of the Attorney General's deferral policy. If that policy was not reviewable, the interlocutory order was invalid, and hence the objection interposed pursuant to it would be invalid.

tections of Section 5 are lifted is enforceable by the judiciary in proceedings for judicial review, for the same reasons that the rights of a union electorate are enforceable by a limited (although somewhat broader) review of the Secretary of Labor's decision not to challenge a union election.

There is no unfairness in affording this limited judicial review to voters even though covered jurisdictions cannot obtain review of the Attorney General's determination and are instead confined to the declaratory judgment proceeding in the District of Columbia. Perfect symmetry in judicial review proceedings is not required, so long as the substantial rights of all parties may be asserted in a judicial forum. See, *e.g.*, *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576 (rail carrier may obtain review of administrative reparations order only in defense of enforcement action by shipper). The *de novo* suit provided for in the District of Columbia is a full and complete remedy for covered jurisdictions.[21] *South Carolina v. Katzenbach, supra,* 383 U.S. at 332.

The court below also emphasized the congressional purpose to allow the Attorney General freely to exercise his discretion regarding compliance with the substantive requirements of Section 5 (J.S. App. 22a–23a). We agree that the preservation of that discretion is of great importance to the administration of

[21] Although not an indispensable party (*Harper* v. *Kleindienst*, *supra*, 362 F. Supp. at 744), a covered jurisdiction, of course, may intervene in any suit challenging the Attorney General's failure to object and defend its interest. Appellees did not do so here.

the Voting Rights Act. In our view, however, the *Harper* ruling correctly supports that policy, by requiring the Attorney General to exercise his discretion. We believe that a proper reading of the limited judicial review undertaken by the *Harper* court—review in the nature of mandamus of the Attorney General's failure to exercise his discretion on the basis of a stated policy [22] found by the *Harper* court to be contrary to the procedural requirements of the Voting Rights Act—will not interfere with the substantive determinations committed by Section 5 to the discretion of the Attorney General.

The Senate apportionment in Act 1205 has been in effect for legislative sessions since 1973 (A. 53). In November 1976 state Senators were elected for four-year terms under that plan (see Brief for Appellants, pp. 31–32). As shown above, the use of this plan violates the Voting Rights Act, and inflicts irreparable injury on the voters of South Carolina. We support appellants' request for special elections to be held in November 1978 to coincide with statewide legislative, congressional and gubernatorial elections (*ibid.*) because plaintiffs have diligently pursued their rights, and special elections will not cause undue disruption of the State's legislative process or prejudice the rights of any voters. Cf. *Town of Sorrento* v. *Reine,* 425 U.S. 946; *Hadnott* v. *Amos,* 394 U.S. 358; *Swann* v. *Adams,* 383 U.S. 210.

In sum, we submit that, in light of *Connor* v. *Waller, supra,* and *Dunlop* v. *Bachowski, supra,* the

[22] See pp. 15–16, *supra.*

decision in *Harper* v. *Levi* was correct, and that the district court erred in refusing to enforce the Attorney General's objection interposed pursuant to Section 5 and the *Harper* court's order. In the alternative, if the Court considers Act 1205 to embody a court-ordered plan within the meaning of *East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636, then the district court abused its discretion by authorizing multimember districts. See note 8, p. 13, *supra.* In either event special elections should be conducted in November 1978 under a lawfully adopted plan.

CONCLUSION

The judgment of the district court should be reversed with directions to enter judgment for appellants to require that special elections be held under a proper plan no later than November 1978.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
DREW S. DAYS, III,
Assistant Attorney General.
LAWRENCE G. WALLACE,
Deputy Solicitor General,
HOWARD E. SHAPIRO,
Assistant to the Solicitor General.
BRIAN K. LANDSBERG,
JOHN C. HOYLE,
Attorneys.

April ~~MARCH~~ 1977.

APPENDIX A

THE STATE OF SOUTH CAROLINA

At a General Assembly Begun to be Holden at Columbia, on the Second Tuesday in January, in the Year of Our Lord One Tho. and Nine Hundred and Seventy-Two, and Thence Continued by Divers Adjournments to the —— day of ——

In the Year of Our Lord One Thousand Nine Hundred and Seventy-Two

An Act No. 1205

To Reapportion the Senate of the General Assembly of South Carolina

Be it enacted by the General Assembly of the State of South Carolina

Section 1. The General Assembly makes findings of fact and statements of policy as follows:

1. It is the public policy of this State that counties, as constitutionally recognized political subdivisions of this State, shall be treated as basic units to construct election districts for the reapportionment of the Senate; and because of historical association, the charging of counties with various responsibilities incident to the operation of State government, the organization of county governments, special purpose districts, school districts and other governmental units of common interest, and the enactment by this Assembly of local legislation for such counties, it is the public

policy of the State that in reapportioning the Senate, and in order to deter the possibilities of gerrymandering, county boundaries should not be disturbed.

2. It is found by the General Assembly that, in order to achieve effective representative government, when it becomes necessary to group counties into a senatorial district for purposes of reapportionment of the Senate, they shall be grouped on the basis of compactness, proximity, common economic interests and characteristics, comparable geographical features and degree of urbanization.

3. The difficulty of reapportioning the Senate within acceptable tolerances, both presently and in the future, makes desirable the establishment of senatorial districts with considerable flexibility or variation in the number of Senators and the number of counties for each election district.

4. It is the policy of this state, using the findings set forth above, to adopt a plan of reapportionment based substantially on population and to avoid any dilution of the equal population plan in any significant way.

5. That the General Assembly as a whole and acting through committees had the matter of reapportioning of the Senate before it from March 23, 1971 until November 11, 1971 when Act No. 932 of 1971 was signed by the Governor. That being cognizant of the gravity of this matter and the time element necessary to properly conduct the elections in 1972, it immediately directed the Attorney General of the State under the provisions of Concurrent Resolution S 671 to immediately institute an action to determine the validity of Act No. 932 of 1971. That as a result

of the latter action an order of the three judge court for the District of South Carolina, Columbia Division, was issued on April 7, 1972, declaring the 1971 act invalid and granting the General Assembly thirty days in which to enact another plan for its consideration which would be within the guidelines set forth in the order.

6. That thereafter the Joint Legislative Committee on Senate Reapportionment met and recommended a plan to reapportion the Senate containing the provisions hereinafter set forth in Plan A.

That thereafter the Senate adopted the Joint Legislative Committee's recommendation and passed a bill to reapportion the Senate containing the provisions set forth in Plan A. That the House of Representatives then amended the Bill and passed the same containing the provisions hereafter set forth as Plan B. That thereafter a Conference Committee was appointed which has been deliberating but that under the time limitations the differences have not been reconcilable to this date and that rather than to default in the matter it is the consensus of the General Assembly that the plans which have been adopted by the separate Houses should be submitted to the Court with the firm belief that one of the plans so submitted will be acceptable to and adopted by the Court as being in compliance with the guidelines set forth in its order.

7. That the attached exhibit is made a part of this act to give a ready reference as to how the plans meet the guidelines and criteria set forth in the Court's order of April 7, 1972.

SECTION 2. Effective with the 1972 elections, the State of South Carolina is hereby divided into the following Senatorial Districts:

PLAN A

		Number Senators	1970 population	Percent variance from average
1	Abbeville	4	226, 270	+0. 45
	Anderson			
	Oconee			
	Pickens			
2	Greenville	5	290, 259	+3. 08
	Laurens			
3	Greenwood	1	57, 641	+2. 35
	McCormick			
4	Spartanburg	3	173, 724	+2. 83
5	Cherokee	2	109, 822	−2. 49
	Newberry			
	Saluda			
	Union			
6	York	3	163, 271	−3. 36
	Lancaster			
	Kershaw			
7	Chester	5	283, 678	+0. 75
	Fairfield			
	Richland			
8	Edgefield	4	228, 853	+1. 59
	Aiken			
	Barnwell			
	Bamberg			
	Lexington			
9	Lee	2	107, 979	−4. 13
	Chesterfield			
	Marlboro			
	Dillon			
10	Darlington	1	53. 442	−5. 10
11	Florence	4	224, 141	−0. 50
	Marion			
	Horry			
	Williamsburg			
12	Sumter			
	Clarendon	2	105, 029	−6. 75
13	Calhoun			
	Orangeburg			
	Dorchester	2	112, 845	+0. 19

		Number Senators	1970 population	Percent variance from average
14	Berkeley	1	56, 199	−0. 21
15	Allendale	2	116, 213	+3. 18
	Hampton			
	Jasper			
	Beaufort			
	Colleton			
16	Charleston	5	281, 150	−0. 15
	Georgetown			

Each senate office shall constitute a separate and distinct office to which a separate number shall be assigned within each senatorial district. A candidate for the office of Senator within any such district shall be required to qualify for a specific senate office and shall not be permitted to qualify for more than one such office in any one election for the office of Senator.

The election ballots for the office of Senator in each district shall reflect the number assigned to each senate office and the names of the candidates for each.

In the event that Plan A does not meet the constitutional guidelines as set forth by the Three Judge Federal Court in its order of April 7, 1972, then the Senate of South Carolina shall be apportioned as follows:

PLAN B

		Number Senators	1970 population	Percent variance from average
1	Abbeville	3	167, 314	−1
	Anderson			
	Oconee			
1A	Pickens	1	58, 959	+4. 68

Provided, that if the Court determines that the division of District 1 into Districts 1 and 1A consti-

tutes an unacceptable variance, they shall be joined and designated as District 1 with four Senators assigned thereto.

		Number Senators	1970 population	Percent variance from average
2	Greenville	5	290, 259	3. 08
	Laurens			
3	Spartanburg	3	173, 724	2. 83
4	Greenwood	1	57, 641	2. 35
	McCormick			
5	Cherokee	4	215, 145	−4. 49
	Chester			
	Fairfield			
	Lancaster			
	York			
6	Newberry	1	58, 503	3. 88
	Union			
7	Richland	4	233, 868	3. 82
8	Calhoun	2	114, 320	1. 50
	Lexington			
	Saluda			
9	Aiken	2	106, 715	−5. 25
	Edgefield			
10	Allendale	2	112, 607	−0. 02
	Bamberg			
	Barnwell			
	Orangeburg			
11	Beaufort	2	106, 521	−5. 42
	Colleton			
	Hampton			
	Jasper			
12	Charleston	5	279, 926	−0. 59
	Dorchester			
13	Lee			
	Chesterfield	1	51, 990	−7. 68
13–A	Marlboro			
	Dillon	1	55, 989	−0. 58

Provided, that if the Court determines that the division of District 13 into Districts 13 and 13A constitutes an unacceptable variance, they shall be joined and designated as District 13 with two senators assigned thereto.

		Number Senators	1970 population	Percent variance from average
14	Kershaw	2	114, 152	1. 35
	Sumter			
15	Clarendon	2	115, 240	2. 32
	Florence			
16	Georgetown	3	168, 005	−0. 56
	Horry			
	Marion			
	Williamsburg			
17	Berkeley	1	56, 199	−0. 21
18	Darlington	1	53, 442	−05. 10

Each senate office shall constitute a separate and distinct office to which a separate number shall be assigned within each senatorial district. A candidate for the office of Senator within any such district shall be required to qualify for a specific senate office and shall not be permitted to qualify for more than one such office in any one election for the office of Senator.

The election ballots for the office of Senator in each district shall reflect the number assigned to each senate office and the names of the candidates for each.

SECTION 3. Each House office in this State shall constitute a separate and distinct office to which a separate number shall be assigned within each election district for such an office. A candidate for such an office shall be required to qualify for a specific office and shall not be permitted to qualify for more than one such office in any one election.

The election ballots for House offices shall reflect the number assigned to each office and the names of the candidates.

SECTION 4. This act shall take effect upon approval by the Governor.

In the Senate House the 5th day of May, 1972, the Year of Our Lord One Thousand Nine Hundred and Seventy-two——

_____ _____,
President of Senate

_____ _____,
Speaker of the House of Representatives, Pro Tempore

Approved the 6th day of May, 1972

_____, *Governor*

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

CIVIL ACTION NOS. 71-1106, 71-1123, 71-1211

MAGGIE H. TWIGGS, PLAINTIFF

v.

JOHN C. WEST, GOVERNOR OF SOUTH CAROLINA, O. FRANK THORNTON, SECRETARY OF STATE OF SOUTH CAROLINA, EARLE E. MORRIS, LIEUTENANT GOVERNOR, PRESIDENT OF THE SOUTH CAROLINA SENATE, AND LOVICK O. THOMAS, CLERK OF THE SENATE OF THE SOUTH CAROLINA GENERAL ASSEMBLY, DEFENDANTS

AND

DANIEL R. MCLEOD, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND AS ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA, PLAINTIFF

v.

JOHN C. WEST, GOVERNOR OF THE STATE OF SOUTH CAROLINA, EARLE E. MORRIS, JR., LIEUTENANT GOVERNOR OF THE STATE OF SOUTH CAROLINA AND PRESIDENT OF THE SOUTH CAROLINA SENATE, LOVICK O. THOMAS, CLERK OF THE SOUTH CAROLINA SENATE,

AND G. P. CALLISON, MRS. MARGARET TOWNSEND, MRS. MARTHA C. CHAPMAN, EDGAR L. MORRIS, AND ERNEST A. FINNEY, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA STATE ELECTION COMMISSION, DEFENDANTS

GILBERT E. MCMILLAN AND C. KENNETH POWELL,

PLAINTIFFS-INTERVENORS

AND

MATTHEW D. MCCOLLUM, TOBIAS GADSEN, FLOSSIE GORDON, EUGENE CAMPBELL, LEVI G. BYRD, JAMES CRAWFORD, SAMUEL BOLDEN, LEVERNE STEVENSON, QUINCY SMITH, WILLIAM MCKINLEY BOWMAN, JOHN ROY HARPER II, W. F. GIBSON, MOSES DILLIARD, JERRY WILSON, I. DAY WATSON, MRS. VICTORIA DELEE, MRS. DOROTHY L. MATTHEWS, MRS. RACHEL H. JOHNSON, PLAINTIFFS

v.

JOHN C. WEST, GOVERNOR OF THE STATE OF SOUTH CAROLINA; EARLE E. MORRIS, JR., LIEUTENANT GOVERNOR OF THE STATE OF SOUTH CAROLINA AND PRESIDENT OF THE SOUTH CAROLINA SENATE; LOVICK O. THOMAS, CLERK OF THE SOUTH CAROLINA SENATE; AND G. P. CALLISON, MRS. MARGARET TOWNSEND, MRS. MARTHA C. CHAPMAN, EDGAR L. MORRIS AND ERNEST A. FINNEY, JR., AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA STATE ELECTION COMMISSION, DEFENDANTS.

Before HAYNSWORTH, Chief Judge, Fourth Judicial Circuit, and RUSSELL, Circuit Judge, and MARTIN, Chief District Judge, District of South Carolina.

ORDER

We have considered the Act of the South Carolina General Assembly, passed on May 5, 1972 and signed by the Governor on May 6, 1972, reapportioning the South Carolina Senate. We have reviewed each of the three plans in that Act as well as other plans submitted to the General Assembly. With the assistance of a computer, we sought to determine whether any other plan might be devised which would be materially better than those submitted by the General Assembly.

Plan A, which the General Assembly asked us to consider first, is within the guidelines set forth in our opinion of April 7, 1972, and no other plan submitted to the General Assembly or which the Court was able to devise is a substantial improvement over Plan A.

The Court finds Plan A complies with the requirements of the Constitution of the United States, and it is therefore approved.

Accordingly, it is ordered that the impending elections to the South Carolina Senate and all subsequent elections be held in conformity with Plan A of the Act unless it is revised by the General Assembly or until after the census of 1980 or the further order of this Court.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit
DONALD RUSSELL
United States Circuit Judge
J. ROBERT MARTIN, JR.
United States District Judge

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